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POLITICIZATION OF THE JUSTICE DEPARTMENT AND ALLEGATIONS OF SELECTIVE PROSECUTION

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JULY 10, 2008

Serial No. 110–191

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
43–356 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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JULY 10, 2008

POLITICIZATION OF THE JUSTICE DEPARTMENT AND ALLEGATIONS OF SELECTIVE PROSECUTION

THURSDAY, JULY 10, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:12 a.m., in Room 2141, Rayburn House Office Building, the Honorable Linda T. Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Conyers, Sánchez, Johnson, Lofgren, Delahunt, Watt, Cohen, and Cannon.

Also present: Representatives Jackson Lee and Smith.

Staff present: Eric Tamarkin, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. The Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

Before we begin the business of the Subcommittee, I want to make clear to our guests in the audience that any outbursts or comments or disruptions in the hearing from the public will result in removal from the Committee room.

I just want to state that emphatically so everybody knows the rules going in.

Without objection, the Chair will be authorized to declare a recess of the proceedings at any point.

At this time, I would recognize myself for a short statement.

According to letters we have received from his counsel, former presidential advisor, Karl Rove, has refused to appear today to answer questions in accordance with his obligations under the subpoena served on him based on claims that executive privilege confers upon him immunity from even appearing to testify.

I am extremely disappointed and deeply concerned that Mr. Rove has chosen to forego this opportunity to give his account of the politicization of the U.S. Department of Justice, including allegations regarding the prosecution of Former Governor John Siegelman.

I have given Mr. Rove's written claims careful consideration, and I rule that those claims are not legally valid, and that Mr. Rove

is required, pursuant to the subpoena, to be here now and to answer questions.

I will presently entertain a motion to sustain that ruling, the grounds for which are set forth in writing and have been distributed to all the Members of the Subcommittee.

But first, I would like to summarize the grounds for the ruling as follows.

First, the claims are not properly asserted. When a private party like Mr. Rove is subpoenaed by Congress and the executive branch objects on privilege grounds, the private party is obligated to respect the subpoena and the executive branch should go to court or otherwise pursue its privilege obligations.

That is what happened in the AT&T case and what should have happened here.

But we have not received a statement from the president or anyone at the White House directly asserting these privilege and immunity claims to the Subcommittee.

Second, we are unaware of any proper legal basis for Mr. Rove's refusal even to appear today as required by the subpoena. The courts have made clear that no one, not even the president, is immune from compulsory process. That is what the Supreme Court ruled in *U.S. v. Nixon* and *Clinton v. Jones.*

Neither Mr. Rove's lawyer nor the White House has cited a single court decision to support the immunity claim as to former White House officials.

The proper course of action is for Mr. Rove to attend the hearing, pursuant to the subpoena, at which time any specific assertions of privilege can be considered on a question-by-question basis.

As the Supreme Court explained more than a century ago, no man in this country is so high that he is above the law, and all the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

Third, the claims of absolute immunity directly contradict the conduct of this and past Administrations with respect to White House officials appearing before Congress.

Only recently, current vice presidential chief of staff, David Addington, testified before the House Judiciary Committee pursuant to subpoena, and former White House press secretary, Scott McClellan, testified without even receiving a subpoena.

In 2007, former White House officials Sara Taylor and Scott Jennings testified concerning the U.S. attorney firings before the Senate Judiciary Committee pursuant to a subpoena.

Prior to this Administration, a CRS study shows that both present and former White House officials have testified before Congress at least 74 times since World War II

Fourth, the claims of absolute immunity and the refusal to appear pursuant to subpoena and to answer questions directly contradicts the behavior of Mr. Rove and his attorneys themselves.

When Mr. Rove's attorney was asked earlier this year by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, he responded, "Sure," by e-mail.

In addition, unlike Harriet Miers, Mr. Rove has spoken extensively in the media on the very subject the Subcommittee seeks to

question him about; his role in the alleged politicization of the Justice Department, including the Siegelman case, and the unprecedented firing of nine U.S. attorneys in 2006.

Fifth and finally, especially to the extent that executive privilege is the basis for the claims of immunity as to Mr. Rove, the White House has failed to demonstrate that the information we are seeking from him under the subpoena is covered by that privilege.

The courts have made clear that executive privilege applies only to discussions involving the president and to communications from or to presidential advisers in the course of preparing advice for the president.

But the White House has maintained that the president never received any advice or and was not himself involved in the U.S. attorney firings and related events.

The presidential communications privilege simply does not come into play here at all.

For all the foregoing reasons as stated more fully in the written ruling that has been distributed to Members of the Subcommittee, I hereby rule that Mr. Rove's claims of immunity are not legally valid, and his refusal to comply with the subpoena and appear at this hearing to answer questions cannot be properly justified.

These reasons are without prejudice to one another and to any other defects that may, after further examination, be found to exist in the asserted claims.

At this time, I would now recognize my colleague, Mr. Cannon, the Ranking Member of the Subcommittee, for any remarks that he may have.

Mr. Cannon?

Mr. CANNON. Thank you, Madam Chair.

I was just wondering as you read your statement if you are aware that Mr. Rove is out of the county on a trip that was planned long before this hearing was set.

Ms. SÁNCHEZ. We have been in constant communication with his attorney and himself, and he has refused to testify, not because it was inconvenient to his schedule, but because he is asserting that he is covered by an Executive immunity claim.

Mr. CANNON. So I take it you are aware that he is on a long-planned trip, and this hearing was scheduled for our convenience, not his?

Ms. SÁNCHEZ. He did not—his attorney never mentioned it to us in all the numerous correspondence and specifically relating to the date that we asked him to come and appear before the Subcommittee.

Mr. CANNON. It was my understanding that he actually had communicated he had a trip planned and so could not be here today.

Are you also aware——

Ms. SÁNCHEZ. We were not aware and we were not made aware by his attorney or by Mr. Rove himself.

Mr. CANNON. Are you aware that Mr. Rove has offered to sit down and talk about these things off the record—not off the record but in a private conversation and answer the questions that you have asked?

Ms. SÁNCHEZ. He has tried to assert a position that he would come and discuss one matter only.

And the Subcommittee has significant interest in more than just one matter.

We believe that he should appear like any other witness to be sworn in and to have his comments made into the record and to be asked questions by the Subcommittee in a give-and-take that mere written questions would not suffice.

Mr. CANNON. Thank you, Madam Chair.

This hearing was called to hear from Karl Rove about allegations that he politically manipulated the prosecution of Don Siegelman, the firing of U.S. attorneys, and other matters.

The allegation is that, with Mr. Rove's involvement, Democrats were prosecuted while Republicans were not, and that U.S. attorneys that did not cooperate were sacked.

If such allegations were true, they would be very serious. But there is no evidence supporting these allegations at all. In fact, there is compelling reason to question the basis of these allegations.

In the Siegelman case, the majority rests on the transparently ludicrous allegations of Jill Simpson. Even Don Siegelman has denied her allegations.

Equally important, the career prosecutor who led the Siegelman prosecution—this is a career person, not a political appointee—Acting Attorney Louis Franklin, clearly stated long ago that the prosecution was not the result of political influence.

To quote, "I can state with absolute certainty that Karl Rove had no role whatsoever in bringing about the investigation or prosecution of Former Governor Don Siegelman.

"It is intellectually dishonest to even suggest that Mr. Rove influenced or had any input into the decision to investigate or prosecute Don Siegelman.

"That decision was made by me, Louis D. Franklin, Sr., as the acting U.S. attorney in the case, in conjunction with the Department of Justice's Public Integrity Section and the Alabama Attorney General's Office.

"Each office dedicated both human and financial resources. Our decision was based solely upon evidence in the case, evidence that unequivocally established that Former Governor Siegelman committed bribery, conspiracy, mail fraud, object instruction of justice, and other serious Federal crimes."

That puts the matter to rest. What about the U.S. attorney firings?

Same answer. Kyle Sampson, the key witness told us exactly 1 year ago today that either Mr. Rove nor anyone else in the White House ever, to his knowledge, sought the resignation of any of the dismissed U.S. attorneys in order to seek a partisan advantage in a given case or investigation or for any other reason unrelated to ordinary performance concerns.

So this is all old news. And it is old news that nothing happened.

What else is old news? As early as March 2007, the White House was willing to let us sit down with Karl Rove and interview him about allegations against him; that in the run-up to this hearing, Mr. Rove was still willing to sit down and talk to us in an interview about the Siegelman matter, with no prejudice to the Commit-

tee's ability to institute further proceedings if it found anything wrong.

Then on July 23, in oral arguments in the Committee's case against Harriet Miers, the district court judge told the Committee pointedly that negotiations should be the preferred way to work these things out and, of course, that once again ignoring the court's admonition and common sense, Committee Democrats rejected Mr. Rove's offer of voluntary testimony and opted to hold a hearing today in front of an empty chair.

If the majority was serious about getting to the bottom of this issue, it would have taken Mr. Rove and White House up on these offers.

The fact is that it hasn't proof that their efforts opt to more than a partisan stunt.

Rather than indulge in partisan antics, the majority should be attending to the truly important matters that are confronting Congress in the few legislative days we have left in this Congress.

We should be holding hearings on the Milberg Weiss class action trial lawyer scandal. A convicted lawyer at the center of the scandal says illegal kick-backs to class-action plaintiffs are industry practice.

We have no business considering the majority's bills next week to roll back arbitration and deliver consumers to the trial lawyers until we get to the bottom of this abuse of our justice system.

But we won't. We should be holding hearings on legislation to bring down gas prices such as my bill to cut the red tape, keeping trillions of barrels of oil from mountain shale from getting to American consumers or my bill to equalize discriminatory taxes on natural gas consumers so that they can pay their bills this winter.

But we won't.

To quote Woody Allen in the movie, "Bananas," this meeting today is "a travesty of a mockery of a sham."

I hope we can act on the issues that are important to the American people before we adjourn.

And I yield back the balance of my time.

Ms. SÁNCHEZ. The gentleman yields back.

This time, I would recognize Mr. Smith, the Ranking Member of the full Judiciary Committee for an opening statement if he so chooses.

Mr. SMITH. Thank you, Madam Chair.

I do have a brief opening statement.

Madam Chair, although we find ourselves in front of an empty chair, it is not a sign of an Administration refusing to cooperate with Congress.

Nearly a year and a half ago, the Administration offered the Committee a voluntary interview with Karl Rove, a senior adviser to the president.

The Democratic majority declined the offer.

In most instances, the Administration has negotiated successfully with Congress to resolve information requests.

Mr. Rove offered to conduct a voluntary interview regarding the Siegelman matter. The Democratic majority refused.

Mr. Rove offered to answer written questions. Again, the Democratic majority refused.

These offers were without prejudice to the Committee's ability to pursue further process if it wanted to.

The offers should have been accepted. But time and again, the Democratic majority has passed up the opportunity to gather information.

As to the issue before us, since the presidency of George Washington, presidents and Department of Justice officials from both parties have asserted that the president's closest advisers are immune from congressional testimony.

For example, in a 1999 opinion for President Clinton, then Attorney General Janet Reno stated that, "An immediate adviser the president is immune from compelled congressional testimony."

Karl Rove serves as assistant to the president, deputy chief of staff, and senior adviser to the president. He is the definition of an immediate adviser. An assertion of his immunity should be expected by anyone familiar with historical precedence.

Once already, this Congress, the Democratic majority has tried to force the issue of compelled testimony by immediately advisers to the president. That effort led to contempt resolutions against Harriet Miers and Joshua Bolten.

Litigation is pending in the district court and is unlikely to be concluded prior to the adjournment of this Congress.

It is clear today's hearing is a likely prelude to another recommendation of contempt of the House and the debate of another contempt citation on the floor.

Just 17 days ago, a district court judge heard oral arguments in the case of *Committee v. Miers.* The judge emphasized unmistakably that negotiation, not confrontation, is the preferred means of resolving situations like this. He stressed that both sides stand to lose if they do not work the matter out through negotiation. And he made clear that if the parties cannot resolve the dispute on their own, they may have to negotiate pursuant to the court's instructions.

With these admonitions fresh in mind, Republicans hope the Democratic majority would finally accept Mr. Rove's offer without creating a partisan confrontation.

But again, the Democratic majority has refused.

According to a recent Rasmussen poll, Congress' approval ratings have reached a historic low; only 9 percent of Americans believe we are doing a good job.

The American people have lost faith in the people's House. Today's hearing in no way addresses the most pressing issues before our nation.

Thank you, Madam Chair, and I will yield back.

Ms. SÁNCHEZ. The gentleman yields back.

Without objection, other Members' opening statements will be included in the record.

The Chair would now entertain a motion to uphold the Chair's ruling regarding Mr. Rove's failure to appear and to answer questions.

Mr. CANNON. Parliamentary inquiry, Madam Chair.

Ms. SÁNCHEZ. The gentleman will state his parliamentary inquiry.

Mr. CANNON. I take it then, the opening statements of the Chair that embodied the ruling of the Chair. I am just wondering why—there has been no objection to the ruling, as far as I can understand.

Do we need to have—is it proper to have a motion to support a ruling that has not been challenged?

Ms. SÁNCHEZ. My understanding from the parliamentarian that it is proper to entertain a motion to uphold the Chair's ruling even though no objections to the ruling has been stated.

Mr. CANNON. Yes, Madam Chair, thank you.

I understand that it may be appropriate to do, but I don't understand why you would do it.

Ms. SÁNCHEZ. Well, Mr. Cannon——

Mr. CANNON. At least on our side, nobody has objected to your motion.

Ms. SÁNCHEZ. I believe that the preferred method to make the record is to have a motion upholding the ruling of the Chair.

And although it might not be the gentleman's preferred method of conducting Subcommittee business, that is what we will do here today.

Mr. CANNON. Thank you, Madam Chair.

Mr. CONYERS. Madam Chair?

Ms. SÁNCHEZ. Mr. Conyers?

Mr. CONYERS. I would move to sustain the Chair's ruling.

Ms. SÁNCHEZ. The gentleman so moves. Does any Member seek recognition to speak on the motion?

If not, then a quorum being present, the question is on the motion to sustain the Chair's ruling.

All those in favor will signify by saying "aye."

[A chorus of ayes.]

Ms. SÁNCHEZ. All those opposed will signify by saying "no."

Mr. CANNON. No.

Ms. SÁNCHEZ. In the opinion of the Chair, the ayes have it. The ayes have it, and the motion is sustained.

Ms. LOFGREN. Madam Chair, could we have a roll call vote?

Ms. SÁNCHEZ. A roll call vote is requested. As your name is called, all those in favor will signify by saying "aye" and all those who oppose will say "no" and the Clerk will call the roll.

The CLERK. Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez votes aye.

Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers votes aye.

Mr. Johnson?

Mr. JOHNSON. Aye.

The CLERK. Mr. Johnson votes aye.

Ms. Lofgren?

Ms. LOFGREN. Aye.

The CLERK. Ms. Lofgren votes aye.

Mr. Delahunt?

Mr. DELAHUNT. Aye.

The CLERK. Mr. Delahunt votes aye.

Mr. Watt?

[No response.]
The CLERK. Mr. Cohen?
Mr. COHEN. Aye.
The CLERK. Mr. Cohen votes aye.
Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon votes no.
Mr. Jordan?
[No response.]
The CLERK. Mr. Keller?
[No response.]
The CLERK. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
[No response.]
Ms. SÁNCHEZ. Is there any other Member who wishes to cast or change their vote?
If not, the Clerk will report.
The CLERK. Madam Chair, there were six ayes, one no.
Ms. SÁNCHEZ. A majority having voted in favor—pardon me?
Mr. Watt, would you care to vote?
Mr. Watt votes aye, and the Clerk will report.
The CLERK. Madam Chair, there were seven ayes, one no.
Ms. SÁNCHEZ. A majority having voted in favor, the motion is agreed to.
The Subcommittee and full Committee will take under advisement what next steps are warranted.
This concludes our hearing.
I want to thank everybody for their time and patience.
There being no more pending business today, the Subcommittee on Commercial and Administrative Law is adjourned.
[Whereupon, at 10:31 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RULING OF THE CHAIR, THE HONORABLE LINDA T. SÁNCHEZ, CHAIRWOMAN,
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Ruling of Chairwoman Linda Sánchez on Executive Privilege-Related Immunity Claims By Karl Rove

According to letters we have received from Mr. Karl Rove's counsel, particularly his letters of July 1 and July 9, 2008, Mr. Rove has refused to appear today to answer questions in accordance with his obligations under the subpoena served on him on May 22, 2008, based on claims that "Executive Privilege confers upon him immunity" from even appearing to testify, and that "as a [former] close advisor to the President, whose testimony is sought in connection with his official duties in that capacity, he is immune from compelled Congressional testimony."[1]

I have given these claims careful consideration, and I hereby rule that those claims are not legally valid and that Mr. Rove is required pursuant to the subpoena to be present at this hearing and to answer questions or to assert privilege with respect to specific questions. The grounds for this ruling are as follows:

First, the claims have not been properly asserted here. The Subcommittee has not received a written statement directly from the President, let alone anyone at the White House on the President's behalf, asserting Executive Privilege, or claiming that Mr. Rove is immune in this instance from testifying before us. Nor is any member of the White House here today to raise those claims on behalf of the President. The most recent letter from Mr. Rove's lawyer simply relies on a July 9, 2008 letter to him from the current White House counsel directing that Mr. Rove should disobey the subpoena and refuse to appear at this hearing.

The July 9, 2008 letter from White House Counsel Fred Fielding claims that Mr. Rove "is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and that relate to his or her official duties."[2] As discussed in greater detail below, no general freestanding immunity exists for former presidential advisers – indeed, no credible source has even remotely suggested this is the case – and thus the proper course is to recognize claims of privilege only when properly asserted in response to specific questions during a particular hearing.

The courts have stated that a personal assertion of Executive Privilege by the President is legally required for the privilege claim to be valid. For instance, the District Court of the District of Columbia made clear in the Shultz case that even a statement from a White House counsel that

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[1] Letter from Robert Luskin to Chairman Conyers (July 1, 2008) at 1; Letter from Robert Luskin to Chairman Conyers (July 9, 2008) at 1.

[2] Letter from Fred Fielding to Robert Luskin (July 9, 2008).

he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the "President, as head of the 'agency,' the White House."[3]

It should also be noted that even a formal claim of privilege, by itself, is not enough to prevent a **private party** from complying with a Congressional subpoena. In cases where a Congressional committee rules that asserted claims of Executive Privilege are invalid, the Executive Branch's only recourse beyond further negotiation is to seek a court order to prevent the private party from testifying (or producing documents). This is because neither the Constitution nor any federal statute confers authority upon the President to order private citizens not to comply with Congressional subpoenas.

The Executive Branch recognized this in United States v. AT&T, where the Ford Administration sued to enjoin AT&T, a private party, from complying with a subpoena from a House committee. AT&T recognized that despite the White House's adamant requests that it not comply with its subpoena, it nevertheless was "obligated to disregard those instructions and to comply with the subpoena."[4] The President had no freestanding authority to prevent AT&T from complying. The same is true here.

Second, we are unaware of any proper legal basis for Mr. Rove's refusal even to appear today as required by subpoena. No court has ever held that presidential advisers are immune from compulsory process – in any setting. In fact, the Supreme Court has expressly recognized that presidential advisers, and even members of the President's cabinet, do not enjoy the same protections as the President himself.[5] Moreover, since 1974, when the Supreme Court rejected President Nixon's claim of absolute presidential privilege in United States v. Nixon, it has been clear that Executive Privilege is merely qualified, and not absolute.[6] Neither Mr. Rove's lawyer nor Mr. Fielding or the Office of Legal Counsel ("OLC") at the Justice Department has cited a single court decision to undermine these well-settled principles. Therefore, the proper course of

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[3] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973); see also United States v. Burr, 25 F. Cas. 30, 192 (C.C.Va.1807) (ruling by Chief Justice Marshall that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney).

[4] United States v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)

[5] Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982); Butz v. Economou, 438 U.S. 478, 505-506 (1978).

[6] United States v. Nixon, 418 U.S. 683, 706 (1974).

action for Mr. Rove is for him to attend the hearing pursuant to subpoena, at which time he may, if expressly authorized by the President, assert Executive Privilege in response to specific questions posed by the Subcommittee.

Assuming that Mr. Fielding's July 9, 2008 letter to Mr. Luskin – and its attached materials from the Justice Department's OLC – sets out the case for Mr. Rove's claim for immunity before this Subcommittee, the arguments presented therein are wholly without merit. Most notably, both the letter and its accompanying materials from OLC fail to cite a **single court decision**, nor could they, in support of Mr. Rove's contention that a former White House employee or other witness under federal subpoena may simply refuse to show up to a congressional hearing.

To the contrary, the courts have made clear that no present or former government official is so above the law that he or she may completely disregard a legal directive such as the Committee's subpoena. As the Supreme Court explained more than a century ago, "[n]o man in this country is so high that he is above the law," and "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[7]

Even beyond the case law, the reasoning utilized in the OLC materials, authored by Principal Deputy Assistant Attorney General Steven G. Bradbury, has no application to former presidential advisers. Each of the prior OLC opinions on which Mr. Bradbury relies cover only **current** White House advisers, not former advisers like Mr. Rove. This distinction is crucial, as all of the arguments purportedly supporting absolute immunity for current presidential advisers simply do not apply to former advisers. For example, the primary OLC memorandum from which all subsequent adviser-immunity opinions have been derived, authored by Chief Justice and then-OLC head William H. Rehnquist, reaches the "tentative and sketchy" conclusion that **current** advisers are "absolutely immune from testimonial compulsion by congressional committee[s]" because they must be "presumptively available to the President 24 hours a day, and the necessity of [appearing before Congress or a court] could impair that ability."[8] The same rationale on its face does not apply to former advisers, and thus there is no support for Mr.

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[7] United States v. Lee, 106 U.S. 196, 220 (1882). In addition to U.S. v. Nixon, supra, see also Clinton v. Jones, 520 U.S. 681, 691-2 (1997).

[8] Memorandum for the Honorable John D. Ehrlichman from William H. Rehnquist (Feb. 5, 1971) at 7. The 1999 OLC opinion referred to by Mr. Bradbury similarly covers only current advisers and acknowledges that a court might well not agree with its conclusions. See Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999)(Opinion of Attorney General Janet Reno).

Bradbury's claim that former advisers are immune from Congressional process. And even Mr. Rehnquist himself acknowledged that when White House advisers wish to assert executive privilege, they must first appear before Congress and then assert the privilege.[9]

Moreover, the fact that OLC has, for the first time, opined that former advisers are absolutely immune from testimonial compulsion by Congress, is not entitled to any deference. Such an opinion, unlike that issued by a court, is not an authoritative formulation of the law. Rather, it is only the Executive Branch's view of the law, and is entitled only to the weight that its inherent merit warrants. In this instance, it is clear that Mr. Bradbury's memorandum was ill-conceived and I must reject its conclusions.

This White House's asserted right to secrecy goes beyond even the claims of Richard Nixon, who initially refused to allow his White House Counsel, John Dean, to testify before Congress, on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.[10]

Third, the claims of absolute immunity directly contradict the conduct of this and past Administrations with respect to White House officials appearing before Congress. Only recently, current Vice-Presidential chief of staff David Addington appeared and testified before the House Judiciary Committee pursuant to subpoena, and former White House Press Secretary Scott McClellan appeared and testified without even receiving a subpoena. In 2007, former White House officials Sara Taylor and Scott Jennings testified concerning the U.S. Attorney firings before the Senate Judiciary Committee pursuant to subpoena. Prior to this Administration, both present and former White House officials have testified before Congress numerous times; a Congressional Research Service study documents some 74 instances where White House advisers have testified before Congress since World War II, many of them pursuant to a subpoena.[11]

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[9] See U.S. Government Information Policies and Practices – The Pentagon Papers, Hearing Before the Subcomm. On Foreign Operations and Government Information of the House Committee on Government Operations, 92d Cong., 1st Sess. 385 (1971) (testimony of William H. Rehnquist)

[10] L. Fisher, The Politics of Executive Privilege, at 59-60 (2004).

[11] Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (Apr. 10, 2007).

Fourth, the claims of absolute immunity and the refusal to appear pursuant to subpoena and to answer questions from the Subcommittee directly contradict the behavior of Mr. Rove and his attorney themselves. When Mr. Rove's attorney was asked earlier this year by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, he responded "sure" by e-mail. In addition, unlike Harriet Miers, Mr. Rove has spoken extensively in the media on the very subject the Subcommittee seeks to question him about: allegations regarding his role in the alleged politicization of the Justice Department during this Administration, including the prosecution of prominent Democrats like former Governor Don Siegelman and the unprecedented forced resignations of nine U.S. Attorneys in 2006. It is absolutely unacceptable for former White House personnel to speak publicly about matters and then to refuse to testify before Congress as to those very same matters, under oath and subject to cross-examination, on the basis of a claim of alleged confidentiality.

Fifth, and finally, especially to the extent that Executive Privilege is the basis for the claim of immunity as to Mr. Rove, the White House has failed to demonstrate that the information we are seeking from him under the subpoena is covered by that privilege. We were not expecting Mr. Rove to reveal any communications to or from the President himself, which is at the heart of the presidential communications privilege.

In fact, on June 28, 2007, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the forced resignations of the U.S. Attorneys or in approving or adjusting the list containing their names. We are seeking information from Mr. Rove and other White House officials about their **own** communications and their **own** involvement in the process of the forced resignations of U.S. Attorneys and related aspects of the politicization of the Justice Department.

The White House nevertheless has claimed that Executive Privilege applies, asserting that the privilege also covers testimony by White House staff who **advise** the President, apparently based on the Espy decision.[12]

The Espy court, however, made clear that while the presidential communications privilege may cover "communications made by presidential advisers," such communications are only within the realm of Executive Privilege when they are undertaken "in the course of

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[12] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

preparing advice for the President."[13] But the White House has maintained that the President **never received any advice on, and was not himself involved in,** the forced resignations of the U.S. Attorneys. Thus, the presidential communications privilege could not apply here.

Moreover, whether such communications would even fall under the presidential communications privilege in the context of a Congressional inquiry is far from certain.[14] The Supreme Court in Nixon and the Court of Appeals in Espy both expressly noted that different balancing considerations would apply when the communications at issue were sought by Congress on behalf of the American people. In our view, it is inconceivable that these courts would rule that a congressional investigation, authorized under the Constitution, carries less weight than a civil or criminal trial. More appropriately, such an investigation should be entitled to the greatest deference by the courts, as Congress is tasked specifically with overseeing and legislating on matters concerning the inner-workings of the Executive Branch, and specifically the Justice Department.

For all the foregoing reasons, I hereby rule that Mr. Rove's claims of immunity are not legally valid and his refusal to comply with the subpoena and appear at this hearing to answer questions cannot be properly justified.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted claims.

July 10, 2008

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[13] Id.

[14] Id. at 753.

LETTER TO SCOTT PELLEY FROM KARL ROVE, SUBMITTED BY THE HONORABLE CHRIS CANNON

April 2, 2008

Mr. Scott Pelley
"60 Minutes"
524 West 57th St.
New York, NY 10019

Dear Scott:

Thanks for taking the time to visit Monday. In years past, you have struck me as a professional who wanted to get his story right and wasn't just looking for sensational opportunities to boost ratings. When you ran your story with Dana Jill Simpson on February 24, my reaction was to leave the issue alone with a straightforward denial. After all, I don't know the woman, don't recall ever meeting her and certainly didn't ask her to do anything.

As I told you Monday, the more I reflected on the story, the more questions I had. After all, Ms. Simpson's time on camera was brief – just enough to say I'd asked her to stalk the Governor and get pictures.

I raised a number of my questions yesterday in our call, but in most instances, I received no answer or an unsatisfactorily vague one. So let me try again.

In the course of your interview, did you ask Ms. Simpson in what campaigns she worked as "an operative" with me? When we first met? When I first asked her to take on previous campaign tasks, as she alleged in her interview? And if so, did you check out her claims by, perhaps, calling the candidates in question or their campaign managers, reviewing campaign expenditure reports to see if her name appeared or checking with the DeKalb County Republican chairman or activists (such as the Moore campaign chairman, an effort she told the Judiciary Committee she was active in) to see if she was really "an operative?"

Did you ask when and where her supposed 2001 meeting with me took place at which she was asked to follow Siegelman and photograph him? If so, did you make any effort to see if she could document when and where the meeting was?

And if you were personally convinced by her answers that there was a good likelihood of such a meeting, did you try to figure out if there was any way that I was likely to have been available for such a meeting? Is there a reason you did not avail yourself of the offer I made to your producers of having access to my calendars for that day (and a couple of other days, in order to hide from me the date she claimed for our meeting)?

Didn't it strike you as foolish for me to have asked someone with no particular experience to undertake a task requiring adroit surveillance and shadowing skills, a mission with such potential to blow up in everyone's faces?

Then consider Dan Jill Simpson's September 14, 2007 interview with the House Judiciary Committee that followed an extensive interview by a Democratic committee lawyer. Did it not bother you Ms. Simpson failed to mention the claim she made to you for your February 24, 2008 story? After all, wouldn't that be something Congressman John Conyer's people would find interesting?

Don't you find it odd that in 143 pages of testimony she said nothing about having worked with me in campaigns, nothing about being asked by me to undertake various tasks, nothing about my supposedly having asked her to follow Governor Siegelman and photograph him in a compromising position, nothing about having had meetings with me? In fact, she never says she knows me or has met me. Don't you find that odd?

In fact, did you read the transcript? Did you try to ascertain if there was any evidence that would lead a reasonable person to believe the claims she made to the Judiciary Committee staff about Don Siegelman, Terry Butts, Judge Fuller and others were likely to be accurate? Did it matter to you that following the release of her interview, as one observer has written, that "every single person whose name Simpson invokes as she spins her stories says that she is either lying or deluded?" Are you aware that list of people denying her claims includes Don Siegelman, whom she claims repeatedly urged her to provide her original affidavit?

In fact, did you try to discover whether there was any evidence she did shadow Don Siegelman? Travel records, itineraries, or expense reports that showed Ms. Simpson's travel from Northeastern Alabama matched up with the Governor's schedule? You told me she told people at the time she was shadowing Siegelman: is that proof enough in your mind that she actually was?

Did you ever consider that the Governor's security detail might have taken note of an ample-sized, redheaded woman who kept showing up at his events with a camera? Did you talk with the Alabama Department of Public Safety? In fact, did you ever ask her how she attempted to find him in a compromising position? Was it her practice to shadow him late at night when he was on the road? Peek through hotel windows? Were you satisfied she actually did what she was supposedly asked to do?

Since your broadcast, she has said she has phone records of calls to "Virginia and Washington" that corroborate her charges. Have you made an effort to review those records and ascertain whether she does have more evidence?

And finally, how much work do you personally do on your "60 Minute" stories? Do you leave the legwork up to your producers while you stay focused on your on-camera presence? They called me in October, five months before you appeared on the air. It seemed to me they were then trying to figure out whether to pursue the story. Was that good enough for you?

Or as a journalist, do you like to get personally involved in your stories and talk with its principal figures, dig into all the evidence and come to a professional judgment that what someone has told you has merit and enough weight to put it on the air? Do you feel that maybe at some point as those five months came to a close, it would have been the responsible thing to do to call a subject of your report and say, we have someone who says this and we've done our legwork that leads us to believe that might be the case? Or do you feel if a charge is sensational enough, thoroughly checking it out yourself isn't a necessity?

These are a lot of questions, but they boil down to one: did you ask yourself these before you went on the air?

Sincerely,

Karl Rove

Cc: Sean McManus

LETTER TO THE HONORABLE JOHN CONYERS, JR. FROM ROBERT D. LUSKIN, SUBMITTED BY THE HONORABLE CHRIS CANNON

PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
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202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

April 29, 2008

Robert D. Luskin
202-457-6190
rluskin@pattonboggs.com

VIA FACSIMILE

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Re: Karl C. Rove

Dear Chairman Conyers:

I am counsel for Karl Rove and am writing to respond to your letter of April 17, 2008, inviting Mr. Rove to testify before the Committee on the alleged "politicization of the Department of Justice during this Administration."

Your invitation is premised on reports that I had expressed Mr. Rove's "willingness to testify before the Committee." The report in question was based on an email exchange with a producer for a cable news network and was taken grossly out of context. I am aware that the Committee has been exploring issues related to the Department of Justice for nearly a year and that the Committee had previously sought Mr. Rove's testimony on the same general subject. I know, too, that the question of whether and under what circumstances Mr. Rove (and other current and former senior White House officials) might appear before the Committee has long been discussed by the Committee and the White House and is now the subject of litigation in the United States District Court for the District of Columbia. I never intended to short circuit this process. My remarks were intended only to convey, in response to inflammatory statements by Governor Siegelman, that Mr. Rove would not assert any personal privileges in connection with any potential testimony. Had Mr. Rove's position in fact changed, we would, of course, have advised you directly.

Although your letter invites Mr. Rove's testimony on the "politicization of the Department of Justice during this Administration," the letter principally focuses on allegations arising from the prosecution of former Governor Siegelman. I cannot discern from your letter whether your invitation encompasses the larger question that you pose or the more narrow issue concerning Governor Siegelman. The former includes matters, such as the firing of U.S. Attorneys, that are

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the subject of litigation concerning the scope of executive privilege. As you are well aware, the privilege is not Mr. Rove's personally, and he is not free to take a position at odds with that taken by the White House.

However, we recognize the Committee's legitimate interest in putting to rest the baseless and unsubstantiated charges that have been made by Governor Siegelman and others about his prosecution. In an effort to assist the Committee in its inquiry, Mr. Rove is prepared to make himself available for an interview on this specific issue with Committee staff. Mr. Rove would speak candidly and truthfully about this matter, but the interview would not be transcribed nor would Mr. Rove be under oath. We believe that such an accommodation is consistent with the positions asserted by the White House in prior discussions with the Committee and in the pending litigation, but would also address the Committee's interest in resolving this issue.

Please let me know whether this offer is acceptable to you so that we can make appropriate arrangements.

Yours sincerely,

Robert D. Luskin

Copy: Honorable Linda T. Sanchez
Honorable Tammy Baldwin
Honorable Artur Davis
Elliot Mincberg, Esq.

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LETTER TO THE HONORABLE JOHN CONYERS, JR. FROM ROBERT D. LUSKIN, SUBMITTED BY THE HONORABLE CHRIS CANNON

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May 9, 2008

Robert D. Luskin
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rluskin@pattonboggs.com

VIA FACSIMILE

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Re: Karl C. Rove

Dear Chairman Conyers:

I am writing in response to your letter of May 1, 2008, about my client, Karl C. Rove. You ask that Mr. Rove reconsider his refusal to testify voluntarily before the Committee and threaten the use of compulsory process if he does not agree to your invitation.

Your letter of May 1, 2008, makes clear that the Committee seeks Mr. Rove's testimony on a variety of subjects related to the Department of Justice that are already the subject of a previous Committee subpoena to Mr. Rove. As I emphasized in my letter of April 29, Mr. Rove was not free to respond to your previous subpoena nor is he free now to accept your invitation to testify. Although he has not and does not intend to assert any personal privileges to avoid testifying, he is bound to respect the limitations on his testimony that the White House has expressed to the Committee directly and has maintained in pending litigation. It is hard for me to understand, therefore, what can be gained by plowing the same ground a second time, particularly since the subject matter remains the same and the legal issues are encompassed by litigation in the U.S. District Court for the District of Columbia. Provoking a gratuitous confrontation will not help to reach an accommodation between the interests of the Committee and those of the Executive Branch and is unnecessarily and unfairly burdensome to Mr. Rove.

In my letter of April 29, I offered to make Mr. Rove available for an interview by Committee staff, a compromise intended to permit the Committee to explore the allegations raised by Governor Siegelman and others, while respecting the limits imposed upon Mr. Rove's testimony. In your letter of May 1, you indicated that an interview would not permit the Committee to assemble a "straightforward and clear record" on this matter, since the interview would not be transcribed nor would it be conducted under oath. As an alternative, Mr. Rove is prepared to

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respond to written questions on the subject of the Siegelman prosecution. Mr. Rove's written responses to your questions would give the Committee the "clear and straightforward" record that you profess to require, while still respecting the limits imposed on Mr. Rove by the White House. Such an approach would surely satisfy the Committee's legitimate concerns regarding the allegations.

Please let me know if such an approach is acceptable so that we can make appropriate arrangements.

Yours sincerely,

Robert D. Luskin

Copy: Honorable Linda T. Sanchez
Honorable Tammy Baldwin
Honorable Artur Davis
Elliot Mincberg, Esq.

LETTER TO ROBERT D. LUSKIN FROM THE HONORABLE JOHN CONYERS, JR. AND THE HONORABLE LINDA T. SÁNCHEZ SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

JOHN CONYERS, JR., Michigan
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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 22, 2008

Mr. Robert D. Luskin
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037-1350

Dear Mr. Luskin:

We were disappointed to receive your May 21 letter, which fails to explain why Mr. Rove is willing to answer questions in writing for the House Judiciary Committee, and has spoken on the record to the media, but continues to refuse to testify voluntarily before the Committee on the politicization of the Department of Justice, including allegations regarding the prosecution of former Governor Don Siegelman. Because of that continuing refusal, we enclose with this letter a subpoena for Mr. Rove's appearance before the Committee's Commercial and Administrative Law Subcommittee at 10:00 a.m. on July 10, 2008.

In light of specific statements in your letter, we want to clarify several points. Your letter is incorrect in suggesting that the enclosed subpoena will raise the same issues as the Senate Judiciary Committee's subpoena to Mr. Rove and the pending lawsuit concerning our Committee's subpoena to Harriet Miers. Both these matters focus on the firing of U.S. Attorneys in 2006 and efforts to mislead Congress and the public on that subject. Here, as we have made clear from the outset, the Siegelman case is a principal focus of our request for Mr. Rove to testify. In addition, unlike Harriet Miers, Mr. Rove has made a number of on-the-record comments to the media about the Siegelman case and the U.S. Attorney firings, extending far beyond "general denials of wrongdoing." There is no question that both the prior subpoenas to Mr. Rove and Ms. Miers should have been complied with. But it is even more clear that Mr. Rove should testify as we have now directed.

We would also dispute your contention that we are "provoking a gratuitous confrontation while the issues raised by the Committee's request are being litigated in U.S. District Court or why the Committee refuses to consider a reasonable accommodation." There are a variety of mechanisms for resolution of any dispute between us, and we need not wait for resolution of separate and ongoing litigation to attempt to employ or consider those other mechanisms. We have also previously noted that we do not believe your proposal to respond in writing to written questions is reasonable or consistent with the precedents of this Committee.

Your letter also suggests that Mr. Rove is not a "free agent" and would follow the requests of the White House with respect to his testimony. Particularly in light of the factors discussed above, we hope that the White House will not take the position that Mr. Rove should not testify. Other former White House officials, including Sara Taylor and Scott Jennings who worked with Mr. Rove in the White House's political office, have in fact testified in response to congressional subpoenas, and dealt with questions of privilege on a question-by-question basis. Mr. Rove should follow the same course.

We should make clear, however, that Mr. Rove, as a private party not employed by the government, is himself responsible for the decision on how to respond to the enclosed subpoena, which is a legally binding directive that he appear before the Committee on July 10. In an analogous situation in the 1970s, when the White House attempted to instruct a private party, AT&T, not to comply with a House Subcommittee subpoena, AT&T "felt obligated to disregard those instructions and to comply with the subpoena," resulting in a lawsuit by the Administration seeking to enjoin such compliance.[1] We very much hope that will not be necessary in this case, but we also hope that you will understand that Mr. Rove's obligation, as a private party, is to seek to comply with the enclosed subpoena. Indeed, you appeared to recognize this yourself when you responded to an earlier media inquiry as to whether Mr. Rove would comply with such a subpoena by e-mailing "sure."

Finally, we want to make clear that we are very willing to meet with you and your client to discuss this matter. Please direct any questions or communications to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515(tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

cc: Hon. Lamar S. Smith
Hon. Chris Cannon

[1] U.S. v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Karl Rove

You are hereby commanded to be and appear before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
of the House of Representatives of the United States at the place, date and time specified below.

☑ **to testify** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, DC, 20515
Date: July 10, 2008 Time: 10:00 a.m.

☐ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production:
Date: Time:

To any authorized staff member of the Committee on the Judiciary
to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 22nd day of May, 2008.

Attest: Lorraine C. Miller
Clerk

John Conyers
Chairman or Authorized Member

PROOF OF SERVICE

Subpoena for Mr. Karl Rove

Address [redacted]

before the Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

U.S. House of Representatives
110th Congress

Served by (print name) Sam Sokol

Title Oversight Counsel, House Judiciary Committee

Manner of service By Fax, per agreement w/ Robert Lushin (see 5/22 email from Mr. Lushin to Blair Mirabur)

Date 5/22/08

Signature of Server

Address 2138 Rayburn HOB

LETTER TO ROBERT D. LUSKIN FROM THE HONORABLE JOHN CONYERS, JR. AND THE HONORABLE LINDA T. SÁNCHEZ SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

JOHN CONYERS, JR., Michigan
CHAIRMAN

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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 16, 2008

Via Fax and U.S. Mail

Mr. Robert D. Luskin
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037-1350

Dear Mr. Luskin:

We are writing with respect to the pending subpoena for Mr. Rove's appearance on July 10 before the Committee's Subcommittee on Commercial and Administrative Law and related discussions between you and Committee staff. We want to reemphasize that we expect Mr. Rove to attend the hearing. Any concerns about or objections to specific questions can be dealt with at that time. We also want to state, however, that while we remain willing to work to resolve any concerns on a cooperative basis, your recent proposal to hold an interview limited to the Siegelman matter does not meet the Committee's oversight needs.

Specifically, we understand that you recently suggested to Committee staff that Mr. Rove would be willing to be interviewed by Committee members and staff, without a transcript or an oath, but also without prejudice to the Committee's right to pursue its subpoena for sworn testimony. This is an important step forward, and stands in stark contrast to the White House's demand that it would not allow the Committee to conduct a similar interview with Harriet Miers unless the Committee agreed in advance that it would not thereafter pursue such formal testimony. While we were encouraged by this suggestion, we also understand that you indicated more recently that any such interview that Mr. Rove would agree to prior to July 10 would be limited only to questions concerning the Siegelman matter.

As Committee staff made clear, and as we indicated in our May 1 letter, the proposal that we somehow seek to separate the Siegelman matter from the broader issue of politicization of the Justice Department is unacceptable. Indeed, your own April 29 letter appears to recognize that the Siegelman matter, other selective prosecution matters, and the U.S. Attorney firings are clearly related as part of the concerns regarding politicization of the Justice Department under this Administration that the Committee has been investigating. At this point, moreover, we have not even received a formal objection to the subpoena, which is a legal mandate that Mr. Rove appear as scheduled.

Accordingly, we hope and expect that Mr. Rove will appear on July 10, when any objections to specific questions on executive privilege or other grounds can be dealt with appropriately. We remain very willing to meet with you and your client to discuss this matter. Please direct any questions or communications to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

cc: The Honorable Lamar S. Smith
The Honorable Chris Cannon

LETTER TO THE HONORABLE JOHN CONYERS, JR. FROM ROBERT D. LUSKIN, SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

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July 1, 2008

Robert D. Luskin
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VIA FACSIMILE

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Re: Karl C. Rove

Dear Chairman Conyers:

I am writing in response to your letter of June 16, 2008, concerning the subpoena to my client, Karl C. Rove, which is returnable on July 10, 2008, before the Subcommittee on Commercial and Administrative Law. I understand that you wish to inquire of Mr. Rove about the alleged politicization of the Department of Justice, including, specifically, the termination of U.S. Attorneys and the prosecution of former Gov. Siegelman.

As I have indicated to you in each of my letters, Mr. Rove does not assert any personal privileges in response to the subpoena. However, as a former Senior Advisor to the President of the United States, he remains obligated to assert privileges held by the President. As you are, of course, well aware, the precise question that we have discussed at length in our correspondence – whether a former Senior Advisor to the President is required to appear before a Committee of Congress to answer questions concerning the alleged politicization of the Department of Justice – is the subject of a lawsuit in the United States District Court for the District of Columbia. While I understand that you would prefer – and the Congress has taken the position in the pending litigation – that Mr. Rove appear in person and assert any applicable privileges on a question by question basis, Mr. Rove is simply not free to accede to the Committee's view and take a position inconsistent with that asserted by the White House in the litigation. Accordingly, Mr. Rove will respectfully decline to appear before the Subcommittee on July 10 on the grounds that Executive Privilege confers upon him immunity from process in response to a subpoena directed to this subject.

I hope, however, that we may continue our dialogue aimed at reaching an accommodation that respects the President's privilege while also addressing Congress' oversight obligations. As you know, Mr. Mincberg and I recently discussed our proposal – conveyed in my first letter to you – that Mr. Rove meet informally with the Committee to answer questions about the allegations raised by Gov. Siegelman without transcript or oath. It has consistently been our position, which I clarified for Mr. Mincberg in our recent conversations, that this accommodation, as well as our proposal that Mr. Rove answer written questions about this matter, were without prejudice to the Committee's right, should it be dissatisfied with the results, to attempt to enforce the subpoena. Our goal has always been to explore every possible means to avoid a wholly unnecessary confrontation, particularly since the underlying legal question is likely to be resolved judicially. While we understand the Committee's view that Gov. Siegelman's allegations are part of its larger inquiry into the alleged politicization of the Department of Justice, the Siegelman charges are entirely factually distinct from the allegations concerning the termination of U.S. Attorneys. We had hoped that an interview on the Siegelman matter would, at least, have permitted us all to accomplish something constructive. We very much regret that the Committee was unwilling to take this first, positive step.

I hope, however, that we will continue to explore ways to resolve this matter while the larger legal issues, over which Mr. Rove has no control, are addressed in court.

Yours sincerely,

Robert D. Luskin

Copy: The Honorable Linda T. Sanchez
The Honorable Lamar S. Smith
The Honorable Chris Cannon

LETTER TO ROBERT D. LUSKIN FROM THE HONORABLE JOHN CONYERS, JR. AND THE HONORABLE LINDA T. SÁNCHEZ SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

JOHN CONYERS, JR., Michigan
CHAIRMAN

HOWARD L. BERMAN, California
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ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

July 3, 2008

Via Fax and U.S. Mail

Mr. Robert D. Luskin
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037-1350

Dear Mr. Luskin:

We were disappointed to receive your July 1 letter indicating that your client Karl Rove does not intend to appear before the Subcommittee on Commercial and Administrative Law on July 10, in violation of the subpoena directing him to do so. Your letter is all the more disappointing since other current and former White House officials have testified before the Committee, both voluntarily and pursuant to subpoena, and since you have publicly stated that Mr. Rove would testify if subpoenaed by Congress. We want to make clear that the Subcommittee will convene as scheduled and expects Mr. Rove to appear, and that a refusal to appear in violation of the subpoena could subject Mr. Rove to contempt proceedings, including statutory contempt under federal law and proceedings under the inherent contempt authority of the House of Representatives.

Your letter states that Mr. Rove will not attend the hearing because he is "obligated" to disregard the subpoena as a result of the White House's claim of immunity for former advisors. In fact, precisely the opposite is true. As a private party, Mr. Rove is "obligated" to comply with the subpoena issued to him and, at the very least, appear at the July 10 hearing. Indeed, in a similar situation in the 1970s, when the White House attempted to instruct a private party, AT&T, not to comply with a House Subcommittee subpoena, AT&T "felt obligated to disregard those instructions and to comply with the subpoena," resulting in a lawsuit by the Administration seeking to enjoin such compliance.[1]

In addition, refusing even to attend the hearing flies in the face of the recent conduct of several high-ranking White House officials, including current vice presidential Chief of Staff and presidential assistant David Addington and former White House press secretary Scott McClellan,

[1] U.S. v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)

who testified before the Committee upon invitation (McClellan) or subpoena (Addington). Former White House officials have also testified under subpoena before the Senate Judiciary Committee. Indeed, when you were asked by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, you responded "sure" by e-mail. The Subcommittee is prepared to consider objections to specific questions on privilege grounds, but there is no proper basis for the refusal to appear altogether.

Finally, although we remain willing to discuss proposals to seek to resolve this matter, we want to restate that attempting to separate the Siegelman matter from our related concerns about the politicization of the Justice Department is not acceptable. In fact, your own April 29 letter appears to recognize that the Siegelman matter, other selective prosecution matters, and the U.S. Attorney firings are clearly related as part of the concerns regarding politicization of the Department under this Administration. For this reason, an artificially truncated interview such as the one you propose would not be "constructive," but could instead limit the Committee's ability to understand any role played by Mr. Rove in the matters under investigation.

We strongly urge you to reconsider your position, and to advise your client to appear before the Subcommittee on July 10 pursuant to his legal obligations. Please direct any questions or communications to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515(tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

cc: Hon. Lamar S. Smith
Hon. Chris Cannon

LETTER TO THE HONORABLE JOHN CONYERS, JR. FROM ROBERT D. LUSKIN, SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

PATTON BOGGS LLP
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July 9, 2008

Robert D. Luskin
202-457-6190
rluskin@pattonboggs.com

VIA FACSIMILE

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Re: Karl C. Rove

Dear Chairman Conyers:

In response to your letter of July 3, 2008, concerning the subpoena to my client, Karl C. Rove, I am writing to confirm that Mr. Rove will respectfully decline to appear on July 10 on the grounds that as a close advisor to the President, whose testimony is sought in connection with his official duties in that capacity, he is immune from compelled Congressional testimony.

As I have indicated to you in each of my letters, Mr. Rove does not assert any personal privileges in response to the subpoena. However, and although I know you would prefer otherwise, Mr. Rove is simply not free to take a position inconsistent with that asserted by the President. Most recently, by letter of July 9, 2008 (a copy of which is attached), the White House has reaffirmed the Executive Branch position that immediate Presidential advisors have immunity in this situation and has directed Mr. Rove not to appear.

Your letter of July 3, 2008, repeats the Committee's threat that Mr. Rove's refusal to appear may subject him to statutory contempt under federal law and the inherent contempt authority of the House of Representatives. As you well know, the precise legal issue presented here is already before the United States District Court for the District of Columbia. Threatening Mr. Rove with sanctions will not in any way expedite the resolution of this issue on the merits.

Mr. Rove remains prepared to explore alternatives, including an informal interview or written responses to questions concerning the Siegelman allegations, that would furnish the Committee the information it seeks while respecting Executive Branch confidentiality interests. As I reiterated in my last letter to you, and as I have explained to Mr. Mincberg in our conversations,

PATTON BOGGS LLP
ATTORNEYS AT LAW

our offers carry no conditions whatsoever: The Committee would remain free to seek to enforce the subpoena if it were dissatisfied with the form or substance of the information it obtained through the alternatives we have proposed. I am at a loss, therefore, to understand why the Committee is unwilling to explore the Siegelman accusations unless Mr. Rove is also prepared to discuss a broad range of other factually distinct matters. There is no loss of face or sacrifice of principle in pursuing constructive alternatives, even if they do not address all of the Committee's concerns.

I hope that we will continue to explore ways to resolve this matter while the larger legal issues, over which Mr. Rove has no control, are pending in court.

Yours sincerely,

Robert D. Luskin

Attachment

Copy: The Honorable Lamar S. Smith
The Honorable Chris Cannon
Elliot M. Mincberg

THE WHITE HOUSE
WASHINGTON

July 9, 2008

Dear Mr. Luskin:

As you are aware, on May 22, 2008, the House Judiciary Committee, Subcommittee on Commercial and Administrative Law (the "Committee"), issued a subpoena to your client, former Assistant to the President, Deputy Chief of Staff and Senior Advisor Karl Rove, seeking his appearance for testimony on July 10, 2008, "on the politicization of the Department of Justice, including allegations regarding the prosecution of former Governor Don Siegelman." *May 22, 2008 Letter from Chairman John Conyers, Jr. and Representative Linda T. Sanchez to Robert D. Luskin, Esq.*

We have been advised by the Department of Justice (the "Department") that a present or former immediate adviser to the President is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and relate to his or her official duties. *See* Attachment A (*August 1, 2007 Letter from Steven G. Bradbury to Fred F. Fielding*); *see also* Attachment B (*Memorandum for the Counsel to the President re: Immunity of Former Counsel to the President from Compelled Congressional Testimony*, dated July 10, 2007). As the Committee understands, this constitutional immunity exists to protect the institution of the Presidency, and numerous Administrations - Republican and Democratic - have shared this position. We have been further advised that because Mr. Rove was an immediate presidential adviser and because the Committee seeks to question him regarding matters that arose during his tenure and relate to his official duties in that capacity, Mr. Rove is not required to appear in response to the Committee's subpoena. Accordingly, the President has directed him not to do so. I respectfully request that you communicate this information to Mr. Rove.

Please contact me if you have any questions or would like to discuss these issues.

Sincerely,

Fred F. Fielding
Counsel to the President

Attachments

Robert D. Luskin, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037-1350

ATTACHMENT A

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

August 1, 2007

Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Fielding:

You have asked whether Karl Rove is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the United States Senate. For the reasons discussed below, we believe he is not.

Mr. Rove serves as an Assistant to the President, Deputy White House Chief of Staff, and Senior Adviser to the President. The Committee, we understand, seeks testimony and documents from Mr. Rove about matters arising during his tenure in these positions and relating to his official duties. Specifically, the Committee wishes to ask Mr. Rove about the removal and replacement of several United States Attorneys in 2006. *See* Letter for Karl Rove, Deputy Chief of Staff, from the Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary (July 26, 2007).

As we explained in our opinion to you dated July 10, 2007, regarding a subpoena to former Counsel to the President Harriet Miers, immediate presidential advisers are constitutionally immune from compelled congressional testimony about matters that arise during their tenure as presidential aides and relate to their official duties. *See* Memorandum for the Counsel to the President from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* at 2 (July 10, 2007). In our July 10 opinion, we noted that Assistant Attorney General William Rehnquist defined immediate presidential advisers as "'those who customarily meet with the President on a regular or frequent basis.'" *Id.* at 1 (quoting Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*")).

Based on the information provided to us, Mr. Rove satisfies the Rehnquist definition of immediate presidential adviser. We understand that Mr. Rove is one of the President's closest advisers. He meets with the President quite frequently and advises him on a wide range of policy issues. Mr. Rove's responsibilities and interactions make him a presidential adviser "who customarily meet[s] with the President on a regular or frequent basis." *Rehnquist Memo* at 7. Accordingly, we conclude that Mr. Rove is immune from compelled congressional testimony

about matters (such as the U.S. Attorney resignations) that arose during his tenure as an immediate presidential adviser and that relate to his official duties in that capacity. Therefore, he is not required to appear in response to the Judiciary Committee subpoena to testify about such matters.

Please let me know if we may be of further assistance.

Sincerely,

Steven G. Bradbury
Principal Deputy Assistant Attorney General

ATTACHMENT B

U.S. Department of Justice
Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General Washington, D.C. 20530

July 10, 2007

MEMORANDUM FOR THE COUNSEL TO THE PRESIDENT

Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. *See* Letter for Harriet E. Miers from the Hon. John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, Administrations of both political parties have taken the position that "'the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.'" *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity "is absolute and may not be overborne by competing congressional interests." *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*"). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President "serves as an immediate advisor to the President and is therefore immune from compelled congressional testimony." *Assertion of Executive Privilege*, 23, Op. O.L.C. at 4.

The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, "The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (July 29, 1982) ("*Olson Memorandum*").

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, "in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.[1] Thus, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions." *Id.*; *see also Olson Memorandum* at 2 ("The President's close advisors are an extension of the President.").[2]

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that "if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." *Texts of Truman Letter and Veide Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). "The doctrine

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[1] In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to Members of Congress also applies to congressional aides, even though the Clause refers only to "Senators and Representatives." U.S. Const. art. I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that "the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be "inevitably . . . diminished and frustrated." *Id.* at 617.

[2] *See also History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771-72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his "principal aides").

would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." *Id.* In a radio speech to the Nation, former President Truman further stressed that it "is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser's immunity is derivative of the President's, former President Truman's rationale directly applies to former presidential advisers. We have previously opined that because an "immediate assistant to the President may be said to serve as his alter ego . . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity." Memorandum for the Counsel to the President from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

Please let me know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General

LETTER TO ROBERT D. LUSKIN FROM THE HONORABLE JOHN CONYERS, JR. AND THE HONORABLE LINDA T. SÁNCHEZ SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

JOHN CONYERS, JR., Michigan
CHAIRMAN

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
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ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
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July 10, 2008

Via Fax and U.S. Mail

Mr. Robert D. Luskin
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037-1350

Dear Mr. Luskin:

We were extremely disappointed that your client Karl Rove disobeyed the subpoena served on him and did not even appear – much less testify as required – before the Subcommittee on Commercial and Administrative Law this morning. Enclosed with this letter is a copy of the text of the ruling by Chairwoman Sánchez at today's hearing, rejecting the immunity and privilege claims that you have raised, which was sustained by a 7-1 vote of the Subcommittee. As the ruling explains, as a private party, Mr. Rove could not legally be compelled by the White House to disregard the subpoena, but instead made his own decision to disobey it, for which he is ultimately responsible.

This letter is to formally notify you that we must insist on compliance with the subpoena and to urge you to reconsider your position and advise your client to appear before the Subcommittee pursuant to his legal obligations. Please let us know no later than Tuesday, July 15, if Mr. Rove will comply with the subpoena, or we will proceed to consider all other appropriate recourse. Please direct any questions or communications to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515(tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

cc: Hon. Lamar S. Smith
Hon. Chris Cannon

Enclosure

Ruling of Chairwoman Linda Sánchez on Executive Privilege-Related Immunity Claims By Karl Rove

According to letters we have received from Mr. Karl Rove's counsel, particularly his letters of July 1 and July 9, 2008, Mr. Rove has refused to appear today to answer questions in accordance with his obligations under the subpoena served on him on May 22, 2008, based on claims that "Executive Privilege confers upon him immunity" from even appearing to testify, and that "as a [former] close advisor to the President, whose testimony is sought in connection with his official duties in that capacity, he is immune from compelled Congressional testimony."[1]

I have given these claims careful consideration, and I hereby rule that those claims are not legally valid and that Mr. Rove is required pursuant to the subpoena to be present at this hearing and to answer questions or to assert privilege with respect to specific questions. The grounds for this ruling are as follows:

First, the claims have not been properly asserted here. The Subcommittee has not received a written statement directly from the President, let alone anyone at the White House on the President's behalf, asserting Executive Privilege, or claiming that Mr. Rove is immune in this instance from testifying before us. Nor is any member of the White House here today to raise those claims on behalf of the President. The most recent letter from Mr. Rove's lawyer simply relies on a July 9, 2008 letter to him from the current White House counsel directing that Mr. Rove should disobey the subpoena and refuse to appear at this hearing.

The July 9, 2008 letter from White House Counsel Fred Fielding claims that Mr. Rove "is constitutionally immune from compelled congressional testimony about matters that arose during his or her tenure as a presidential aide and that relate to his or her official duties."[2] As discussed in greater detail below, no general freestanding immunity exists for former presidential advisers – indeed, no credible source has even remotely suggested this is the case – and thus the proper course is to recognize claims of privilege only when properly asserted in response to specific questions during a particular hearing.

The courts have stated that a personal assertion of Executive Privilege by the President is legally required for the privilege claim to be valid. For instance, the District Court of the District of Columbia made clear in the Shultz case that even a statement from a White House counsel that

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[1] Letter from Robert Luskin to Chairman Conyers (July 1, 2008) at 1; Letter from Robert Luskin to Chairman Conyers (July 9, 2008) at 1.

[2] Letter from Fred Fielding to Robert Luskin (July 9, 2008).

he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the "President, as head of the 'agency,' the White House."[3]

It should also be noted that even a formal claim of privilege, by itself, is not enough to prevent a **private party** from complying with a Congressional subpoena. In cases where a Congressional committee rules that asserted claims of Executive Privilege are invalid, the Executive Branch's only recourse beyond further negotiation is to seek a court order to prevent the private party from testifying (or producing documents). This is because neither the Constitution nor any federal statute confers authority upon the President to order private citizens not to comply with Congressional subpoenas.

The Executive Branch recognized this in United States v. AT&T, where the Ford Administration sued to enjoin AT&T, a private party, from complying with a subpoena from a House committee. AT&T recognized that despite the White House's adamant requests that it not comply with its subpoena, it nevertheless was "obligated to disregard those instructions and to comply with the subpoena."[4] The President had no freestanding authority to prevent AT&T from complying. The same is true here.

Second, we are unaware of any proper legal basis for Mr. Rove's refusal even to appear today as required by subpoena. No court has ever held that presidential advisers are immune from compulsory process – in any setting. In fact, the Supreme Court has expressly recognized that presidential advisers, and even members of the President's cabinet, do not enjoy the same protections as the President himself.[5] Moreover, since 1974, when the Supreme Court rejected President Nixon's claim of absolute presidential privilege in United States v. Nixon, it has been clear that Executive Privilege is merely qualified, and not absolute.[6] Neither Mr. Rove's lawyer nor Mr. Fielding or the Office of Legal Counsel ("OLC") at the Justice Department has cited a single court decision to undermine these well-settled principles. Therefore, the proper course of

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[3] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973); see also United States v. Burr, 25 F. Cas. 30, 192 (C.C.Va.1807) (ruling by Chief Justice Marshall that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney).

[4] United States v. AT&T, 551 F.2d 384, 387 (D.C. Cir. 1976)

[5] Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982); Butz v. Economou, 438 U.S. 478, 505-506 (1978).

[6] United States v. Nixon, 418 U.S. 683, 706 (1974).

action for Mr. Rove is for him to attend the hearing pursuant to subpoena, at which time he may, if expressly authorized by the President, assert Executive Privilege in response to specific questions posed by the Subcommittee.

Assuming that Mr. Fielding's July 9, 2008 letter to Mr. Luskin – and its attached materials from the Justice Department's OLC – sets out the case for Mr. Rove's claim for immunity before this Subcommittee, the arguments presented therein are wholly without merit. Most notably, both the letter and its accompanying materials from OLC fail to cite a **single court decision**, nor could they, in support of Mr. Rove's contention that a former White House employee or other witness under federal subpoena may simply refuse to show up to a congressional hearing.

To the contrary, the courts have made clear that no present or former government official is so above the law that he or she may completely disregard a legal directive such as the Committee's subpoena. As the Supreme Court explained more than a century ago, "[n]o man in this country is so high that he is above the law," and "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[7]

Even beyond the case law, the reasoning utilized in the OLC materials, authored by Principal Deputy Assistant Attorney General Steven G. Bradbury, has no application to former presidential advisers. Each of the prior OLC opinions on which Mr. Bradbury relies cover only **current** White House advisers, not former advisers like Mr. Rove. This distinction is crucial, as all of the arguments purportedly supporting absolute immunity for current presidential advisers simply do not apply to former advisers. For example, the primary OLC memorandum from which all subsequent adviser-immunity opinions have been derived, authored by Chief Justice and then-OLC head William H. Rehnquist, reaches the "tentative and sketchy" conclusion that **current** advisers are "absolutely immune from testimonial compulsion by congressional committee[s]" because they must be "presumptively available to the President 24 hours a day, and the necessity of [appearing before Congress or a court] could impair that ability."[8] The same rationale on its face does not apply to former advisers, and thus there is no support for Mr.

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[7] United States v. Lee, 106 U.S. 196, 220 (1882). In addition to U.S. v. Nixon, supra, see also Clinton v. Jones, 520 U.S. 681, 691-2 (1997).

[8] Memorandum for the Honorable John D. Ehrlichman from William H. Rehnquist (Feb. 5, 1971) at 7. The 1999 OLC opinion referred to by Mr. Bradbury similarly covers only current advisers and acknowledges that a court might well not agree with its conclusions. See Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999)(Opinion of Attorney General Janet Reno).

Bradbury's claim that former advisers are immune from Congressional process. And even Mr. Rehnquist himself acknowledged that when White House advisers wish to assert executive privilege, they must first appear before Congress and then assert the privilege.[9]

Moreover, the fact that OLC has, for the first time, opined that former advisers are absolutely immune from testimonial compulsion by Congress, is not entitled to any deference. Such an opinion, unlike that issued by a court, is not an authoritative formulation of the law. Rather, it is only the Executive Branch's view of the law, and is entitled only to the weight that its inherent merit warrants. In this instance, it is clear that Mr. Bradbury's memorandum was ill-conceived and I must reject its conclusions.

This White House's asserted right to secrecy goes beyond even the claims of Richard Nixon, who initially refused to allow his White House Counsel, John Dean, to testify before Congress, on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.[10]

Third, the claims of absolute immunity directly contradict the conduct of this and past Administrations with respect to White House officials appearing before Congress. Only recently, current Vice-Presidential chief of staff David Addington appeared and testified before the House Judiciary Committee pursuant to subpoena, and former White House Press Secretary Scott McClellan appeared and testified without even receiving a subpoena. In 2007, former White House officials Sara Taylor and Scott Jennings testified concerning the U.S. Attorney firings before the Senate Judiciary Committee pursuant to subpoena. Prior to this Administration, both present and former White House officials have testified before Congress numerous times; a Congressional Research Service study documents some 74 instances where White House advisers have testified before Congress since World War II, many of them pursuant to a subpoena.[11]

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[9] See U.S. Government Information Policies and Practices – The Pentagon Papers, Hearing Before the Subcomm. On Foreign Operations and Government Information of the House Committee on Government Operations, 92d Cong., 1st Sess. 385 (1971) (testimony of William H. Rehnquist)

[10] L. Fisher, The Politics of Executive Privilege, at 59-60 (2004).

[11] Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (Apr. 10, 2007).

Fourth, the claims of absolute immunity and the refusal to appear pursuant to subpoena and to answer questions from the Subcommittee directly contradict the behavior of Mr. Rove and his attorney themselves. When Mr. Rove's attorney was asked earlier this year by a media representative whether Mr. Rove would testify before Congress in response to a subpoena on the Siegelman matter, he responded "sure" by e-mail. In addition, unlike Harriet Miers, Mr. Rove has spoken extensively in the media on the very subject the Subcommittee seeks to question him about: allegations regarding his role in the alleged politicization of the Justice Department during this Administration, including the prosecution of prominent Democrats like former Governor Don Siegelman and the unprecedented forced resignations of nine U.S. Attorneys in 2006. It is absolutely unacceptable for former White House personnel to speak publicly about matters and then to refuse to testify before Congress as to those very same matters, under oath and subject to cross-examination, on the basis of a claim of alleged confidentiality.

Fifth, and finally, especially to the extent that Executive Privilege is the basis for the claim of immunity as to Mr. Rove, the White House has failed to demonstrate that the information we are seeking from him under the subpoena is covered by that privilege. We were not expecting Mr. Rove to reveal any communications to or from the President himself, which is at the heart of the presidential communications privilege.

In fact, on June 28, 2007, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the forced resignations of the U.S. Attorneys or in approving or adjusting the list containing their names. We are seeking information from Mr. Rove and other White House officials about their **own** communications and their **own** involvement in the process of the forced resignations of U.S. Attorneys and related aspects of the politicization of the Justice Department.

The White House nevertheless has claimed that Executive Privilege applies, asserting that the privilege also covers testimony by White House staff who **advise** the President, apparently based on the Espy decision.[12]

The Espy court, however, made clear that while the presidential communications privilege may cover "communications made by presidential advisers," such communications are only within the realm of Executive Privilege when they are undertaken "in the course of

[12] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

preparing advice for the President."[13] But the White House has maintained that the President **never received any advice on, and was not himself involved in,** the forced resignations of the U.S. Attorneys. Thus, the presidential communications privilege could not apply here.

Moreover, whether such communications would even fall under the presidential communications privilege in the context of a Congressional inquiry is far from certain.[14] The Supreme Court in Nixon and the Court of Appeals in Espy both expressly noted that different balancing considerations would apply when the communications at issue were sought by Congress on behalf of the American people. In our view, it is inconceivable that these courts would rule that a congressional investigation, authorized under the Constitution, carries less weight than a civil or criminal trial. More appropriately, such an investigation should be entitled to the greatest deference by the courts, as Congress is tasked specifically with overseeing and legislating on matters concerning the inner-workings of the Executive Branch, and specifically the Justice Department.

For all the foregoing reasons, I hereby rule that Mr. Rove's claims of immunity are not legally valid and his refusal to comply with the subpoena and appear at this hearing to answer questions cannot be properly justified.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted claims.

July 10, 2008

[13] Id.

[14] Id. at 753.

LETTER TO THE HONORABLE LINDA T. SÁNCHEZ AND THE HONORABLE CHRIS CANNON FROM BISHOP JOE MORRIS DOSS, SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ

Free America's Political Prisoners, Inc.

P.O. Box 851 * Mandeville, Louisiana 70470-0851
Phone: (985) 951-1078
Facsimile: (800) 754-0723

July 14, 2008

Via Email and U.S. Mail
The Honorable Linda Sanchez
Chairwoman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representative
U.S. Congress
1222 Longworth Building
Washington, DC 20515

The Honorable Christopher Cannon
Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representative
U.S. Congress
2436 Rayburn House Office Building
Washington, DC 20515

Dear Rep. Sanchez and Rep. Cannon:

At the July 10th hearing, statements from Acting U.S. Attorney Louis Franklin were presented as evidence that political considerations were not a factor in Gov. Siegelman's prosecution. Franklin's statement had been submitted to the Committee for the original October 2007 hearing and made part of the official record in that hearing by Rep. Randy Forbes. (pp. 7-9 Transcript of October 23, 2007 Hearing on Allegations of Selective Prosecution: *The Erosion of Public Confidence In Our Federal Justice System*)

Mr. Franklin's statements are contradicted by his own affidavit that he filed in Gov. Siegelman's case, along with the sworn testimony of Richard Pilger of DOJ's Public Integrity Section who participated in the prosecution of Gov. Siegelman.

In his public statement, Franklin states that he made the decision to prosecute Gov. Siegelman and Richard Scrushy's case and that he "knows" that Karl Rove had no influence or input in the decision to prosecute Don Siegelman. These assertions to the public and to the Judiciary Committee are contradicted by his own words in the Government's Response to Richard Scrushy's *Motion to Dismiss Indictment for Prosecutorial Misconduct and Delay in Unsealing Indictment*. Scrushy's Motion, the Government's Response, and the transcript of the

hearing on the motion are enclosed for your review. The Motion was filed due to the fact that after the sealed indictments were brought in May 2005, the Prosecutors had several conversations with defense lawyers at which time they were asked if Gov. Siegelman and Richard Scrushy had been charged or a charging decision had been made and were told by the prosecution that they had not yet been charged or that a charging decision had been made.

Louis Franklin's affidavit is included as an exhibit in the Government's response (Exhibit A). In the affidavit (pp.33-34 of Government's Response) Louis Franklin states that his reason for telling Art Leach on October 25, 2005 that no charging decision had been made regarding Richard Scrushy was because he was waiting on the Criminal Division's final decision about the charges. In the motion itself, it is stated even more clearly (p.6 of Response). In the motion, it states that Louis Franklin was waiting on final AUTHORIZATION from the Criminal Division regarding what charges he could present to the Grand Jury. The superseding indictment was returned the next day, once the Criminal Division had authorized which charges the prosecutors could present to the Grand Jury. In the transcript of the hearing held regarding this motion, Richard Pilger, the Attorney for the Public Integrity Section, states very clearly that Washington, not Louis Franklin, made the decisions regarding charges in the Siegelman/Scrushy case and directed what charges were presented to the grand jury (p. 92 of Hearing Transcript).

In Art Leach's letter regarding his conversation with Andrew Lourie, the Acting Head of Public Integrity, Mr. Leach he was told by Mr. Lourie, that the charging decisions in the Siegelman/Scrushy case were made above the head of Assistant Attorney General Alice Fisher for the Criminal Division. Mr. Leach states he could not imagine a decision like this rising to that level of the Department of Justice. (AAG Fisher and everyone above her were political appointees). This calls into question the veracity of Louis Franklin's statement and representations made by him to the House Judiciary Committee. In fact, it would appear that based upon Franklin's and other DOJ attorney's sworn testimony and Art Leach's letter, that Mr. Franklin could not have known to the degree of certainty he asserts in his statement to the committee, that political motivations were not at play in the prosecution of Gov. Siegelman and Richard Scrushy. Accordingly, Franklin was in no position to definitively state that Karl Rove was not involved.

The question before you is, did Louis Franklin knowingly submit false representations to the committee, or did he misrepresent the facts to the District Court in an effort to keep the District Court from dismissing the case against Gov. Siegelman and Richard Scrushy?

Thank you for your hard work on this difficult topic.

Yours truly,

Bishop Joe Morris Doss

jma

Bishop Joe Morris Doss

DOCUMENT LIST

1. Statement by Louis Franklin

2. Richard Scrushy *Motion to Dismiss Indictment for Prosecutorial Misconduct and Delay in Unsealing Indictment*

3. Government's Response to Richard Scrushy's Motion to Dismiss

4. Transcript of Hearing on Richard Scrushy's Motion to Dismiss for Prosecutorial Misconduct

5. Letter from Art Leach, attorney for Richard Scrushy, regarding his conversation with Andrew Lourie regarding where the decisions in the Siegelman/Scrushy were made

Department of Justice

United States Attorney Leura G. Canary
Middle District of Alabama

FOR IMMEDIATE RELEASE

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STATEMENT OF LOUIS V. FRANKLIN, SR.,
ACTING U.S. ATTORNEY IN THE SIEGELMAN/SCRUSHY PROSECUTION

"Neither I nor the U.S. Attorney's Office for the Middle District of Alabama (MDAL) have heretofore seen the affidavit referenced in Time's article, initially entitled "Rove Linked to Prosecution of Ex-Alabama Governor," and later changed to "Rove Named in Alabama Controversy," stated Louis V. Franklin. "Thus, I cannot speak to the affidavit itself or to the specific allegations made by Dana Jill Simpson except to say that its timing is suspicious, and other participants in the alleged conversation say it didn't happen, most notably Terry Butts, who represented Richard Scrushy during the trial of this case.

I can, however, state with absolute certainty that the entire story is misleading because Karl Rove had no role whatsoever in bringing about the investigation or prosecution of former Governor Don Siegelman. It is intellectually dishonest to even suggest that Mr. Rove influenced or had any input into the decision to investigate or prosecute Don Siegelman. That decision was made by me, Louis V. Franklin, Sr., as the Acting U.S. Attorney in the case, in conjunction with the Department of Justice's Public Integrity Section and the Alabama Attorney General's Office. Each office dedicated both human and financial resources. Our decision was based solely upon evidence in the case, evidence that unequivocally established that former Governor Siegelman committed bribery, conspiracy, mail fraud, obstruction of justice, and other serious federal crimes.

Our decision to prosecute Don Siegelman and Richard Scrushy was based upon evidence uncovered by federal and state agents, as well as a federal special grand jury which convened in the case. The investigation was precipitated by evidence uncovered by a Mobile investigative reporter, Eddie Curran, and a series of stories written by him. The investigation began about the time an article appeared in the Mobile Press-Register alleging an improper connection between then-Governor Siegelman and financial supporter/businessman/lobbyist, Clayton "Lanny" Young, months before Leura Canary was appointed as the U.S. Attorney for the MDAL.

When the investigation first began, Leura Canary was not the U.S. Attorney for the MDAL. Initially, the investigation was brought to the attention of the Interim U.S. Attorney, Charles Niven, a career prosecutor in the U.S. Attorney's Office. Niven had almost 25 years of experience as an Assistant U.S. Attorney in the office prior to his appointment as Interim U.S. Attorney upon U.S. Attorney Redding Pitt's (currently attorney of record for Defendant Siegelman in this case) departure.

Ms. Canary became U.S. Attorney in September 2001. In May 2002, very early in the investigation, and before any significant decisions in the case were made, U.S. Attorney Leura Canary completely recused herself from the Siegelman matter, in response to unfounded accusations that her husband's Republican ties created a conflict of interest. Although Department of Justice officials reviewed the matter and opined that no conflict, actual or apparent,

existed, Canary recused herself anyway to avoid even an appearance of impropriety. I, Louis V. Franklin, Sr., was appointed Acting U.S. Attorney in the case after Charles Niven retired in January 2003. I have made all decisions on behalf of this office in the case since my appointment as Acting U.S. Attorney. U.S. Attorney Canary has had no involvement in the case, directly or indirectly, and has made no decisions in regards to the investigation or prosecution since her recusal. Immediately following Canary's recusal, appropriate steps were taken to ensure that she had no involvement in the case. Specifically, a firewall was established and all documents relating to the investigation were moved to an off-site location. The off-site became the nerve center for most, if not all, work done on this case, including but not limited to the receipt, review, and discussion of evidence gathered during the investigation.

After Canary's recusal, the investigation proceeded much like any other investigation. Federal and state agents began tracking leads first developed by investigative reporter Eddie Curran, leads that eventually led to criminal charges against local architect William Curtis Kirsch, Clayton "Lanny" Young, and Nick Bailey, an aide to the former Governor. Kirsch, Young, and Bailey pled guilty to informations charging violations of federal bribery and/or tax crimes on June 24, 2003.

Armed with cooperation agreements from Bailey, Young and Kirsch, the investigation continued. In June 2004, a special grand jury was convened to further assist in the investigation. An indictment was returned under seal against Mr. Siegelman and ex-HealthSouth CEO Richard Scrushy on May 17, 2005. The first superseding indictment was filed and made public on October 26, 2005, charging Siegelman, Scrushy, Siegelman's former Chief of Staff Paul Hamrick, and Siegelman's Transportation Director Gary Mack Roberts. Immediately after the indictment was announced, Messrs. Scrushy and Siegelman publicly denounced the indictment and personally attacked the prosecutors. Those attacks have continued throughout the case and have now escalated to charges that Karl Rove had something to do with this investigation or prosecution. These charges are simply untrue.

The indictment was solely the product of evidence uncovered through an investigation that began before Leura Canary became U.S. attorney and continued for three years after she recused herself. I have never spoken with or even met Karl Rove. As Acting U.S. Attorney in the case, I made the decision to prosecute the former Governor. My decision was based solely on the evidence uncovered by federal and state agents, as well as the special grand jury, establishing that Mr. Siegelman broke the law.

During the investigation, I consulted with career prosecutors in the Public Integrity Section of Main Justice to obtain guidance on the prosecution of the former Governor, but I alone maintained the decision-making authority to say yea or nay as to whether or not the U.S. Attorney's Office for the MDAL would proceed with the prosecution. Contrary to how the prosecution is portrayed in Adam Zagorin's Time article, rather than the U.S. Department of Justice pushing the MDAL to move forward with the prosecution of former Governor Siegelman, the push has always come from the Middle District's U.S. Attorney's Office and has been spearheaded by me as the Acting U.S. Attorney in the case. My sole motivation for pushing the prosecution was a firmly held belief, supported by overwhelming evidence and the law, that former Governor Siegelman had broken the law and traded his public office for personal and political favors. Ultimately, a jury of former Governor Siegelman's peers, consisting of men and women, African-American and Caucasian, agreed and convicted the former Governor of conspiracy, accepting bribes, and obstructing justice.

I am a career Assistant U.S. Attorney in the Middle District of Alabama. I have served under both Democratic and Republican appointees. I take my role as a government prosecutor and my ethical obligations as a lawyer very seriously. I value my integrity above all else. I would never pursue a prosecution for political reasons, nor would I bring any prosecution not warranted by the evidence or the law. That simply did not happen here, no matter what anyone prints.

In the public interest, one other matter needs to be addressed. Former Gov. Siegelman and Richard Scrushy and others speaking on their behalf have made public claims that the sentence recommended by the United States is excessive. The sentence recommended is appropriate under the advisory U.S. Sentencing Guidelines when all of the relevant conduct associated with this case is weighed as required by the Guidelines and well established federal law. As in all other cases prosecuted by this office, the recommended sentence is reasonable under the Guidelines and existing federal law. The recommended sentence, in brief, is calculated as follows:

base offense level for bribery - 10;

amount of loss and/or expected gain - add 20 levels;
more than one bribe - add 2 levels;
obstruction of justice - add 2 levels;
organizer/leader in the offense - add 4 levels;
upward departure for systematic pervasive government corruption - add 4 levels.

The resulting adjusted guideline level of 42 and criminal history category of I results in a guideline range of 360 months to life imprisonment. Specific justification and explanation for this recommendation is fully articulated in the United States Sentencing Memorandum (Document Number 589) and United States Motion for Upward Departure for Systematic Pervasive Corruption (Document Number 591). These documents are available through accessing the Court's Pacer system."

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	
v.	Case No. 2:05cr119-F
RICHARD M. SCRUSHY, Defendant.	

DEFENDANT RICHARD M. SCRUSHY'S MOTION TO DISMISS INDICTMENT BECAUSE OF PROSECUTORIAL MISCONDUCT AND DELAY IN UNSEALING THE INDICTMENT

COMES NOW Defendant Richard M. Scrushy, by and through undersigned counsel, and moves this Court for entry of an Order dismissing the indictment in this case because of prosecutorial misconduct and undue delay in unsealing the indictment. In support of this request, Defendant respectfully shows this Court the following:

Factual and Procedural Background

On May 17, 2005, a grand jury in the Middle District of Alabama returned the original indictment in this case in which it charged Defendant Scrushy and Don Eugene Siegelman with one count of conspiracy and two counts of federal funds bribery. (Doc 3.) That same day, the United States Attorney's Office filed a "Sealed Motion to Seal Case." (Doc. 1.) According to the Government, the primary reason to seal the indictment was to protect the Defendant Scrushy, who was at that time being tried as a Defendant in an unrelated case in the Northern District of Alabama. *Id.* In its motion, the Government represented to this Court:

> One of the defendants charged in the indictment is presently being tried in the Northern District of Alabama in a complex, high profile case. The United States requests that the instant indictment and the entire case, including all files and documents associated with the case, be sealed to prevent and preclude any undue prejudice to this defendant in the ongoing trial.

Id. ¶ 4. In the same motion, the Government also claimed to be investigating "*other* criminal offenses" by the named defendants and by other people. *Id.* ¶ 5 (emphasis added). Based on these representations, United States Magistrate Judge Charles S. Coody entered an Order granting the Government's motion on May 17, 2005. (Doc 2.)

Defendant Scrushy was acquitted on all counts in the Northern District of Alabama case on June 28, 2005.

Unaware that an indictment had been filed in the Middle District of Alabama five months earlier naming Mr. Scrushy as a Defendant, on October 4, 2005, counsel for Mr. Scrushy approached the Government in this District to engage in negotiations relating to a grand jury investigation which was in progress in the Middle District. Present at that meeting on behalf of Mr. Scrushy were attorneys Arthur W. Leach, Henry Lewis Gillis, Christopher Whitehead, and Les Moore. *See* Sworn Statement of Leslie V. Moore, ¶ 5, attached to this motion as EXHIBIT A and hereby incorporated. Present at that meeting representing the Government were Acting United States Attorney Louis V. Franklin, Sr., Assistant United States Attorney James B. Perrine, Richard Pilger of the Public Integrity Section, Department of Justice, and Joseph Fitzpatrick of the Alabama Attorney General's Office. *Id.*

In the early stages of this meeting, the Government indicated what it believed to be the relevant facts regarding Mr. Scrushy's conduct in the matter it was investigating. Defense counsel asked what the Government would do if Mr. Scrushy could not testify

the way the Government wanted him to testify. Richard C. Pilger, an attorney with the Public Integrity Section of the Department of Justice, indicated that Mr. Scrushy "can expect to be indicted" if he could not testify as the Government expected. *Id.* ¶ 6. Later in the same meeting, Defendant's counsel Arthur W. Leach asked whether the Government had made a decision regarding whether to charge Mr. Scrushy with a crime. Mr. Leach's exact words were, "Has a charging decision been made?" *Id.* ¶ 7. Mr. Pilger responded, "No." *Id.* Mr. Pilger made this representation despite his knowledge that this decision had been made five months earlier and that Mr. Scrushy, at that moment, was a named Defendant in a sealed indictment. At the time he made the statement, Mr. Pilger had actual knowledge of the existence of the indictment and the decision to charge Mr. Scrushy because he signed the original indictment. (Doc. 3 at 11.)

In reliance on this answer from Mr. Pilger, one of Defendant's lead counsel, Mr. Leach, gave the Government attorneys a detailed proffer in which he revealed to the Government attorneys all the facts relating to Mr. Scrushy's involvement and counsels' legal theories as to why Mr. Scrushy's conduct did not violate the law.[1] EXHIBIT A, ¶ 8. Counsel provided the Government attorneys with specific factual information that, but for the Defendant's limited waiver of the attorney-client privilege, would have been privileged and with legal theories that were attorney work-product. Thereafter, Mr. Leach asked the Government to let Mr. Scrushy testify before the grand jury and tell his story to the grand jurors. *Id.* ¶ 10. The Government refused—as we know now because it could not subpoena an indicted defendant.

[1] The discussions were pursuant to Fed. R. Crim. P. 11 and hence are inadmissible at trial pursuant to Fed. R. Evid. 410. Out of an abundance of caution, Defendant has not included the details in this public filing. Counsel is willing to share them with the Court if needed once any attorney-client privilege issues are resolved.

Over the next three weeks, defense counsel had additional telephone conversations with Government attorneys on the case. In those telephone conversations, defense counsel continued to provide the Government attorneys with confidential information that counsel would not have disclosed had he known that a charging decision already had been made and an indictment had been returned five months earlier. On October 25, 2005, Defendant's counsel Leach was on the telephone with several Government attorneys. Defense counsel Les Moore was in the room and heard the conversation. Mr. Leach once again asked whether a charging decision had been made. *Id.* ¶ 12. This time Acting United States Attorney Louis Franklin responded. He told counsel, "No, not at this time." *Id.* Like Mr. Pilger, Mr. Franklin had signed the initial indictment five months before, (Doc 3 at 11), and had also signed the "Motion to Seal Case" on May 17, 2005. (Doc 1 at 2). The next day, October 26, 2005, the grand jury returned the first superseding indictment in this case, signed by Acting United States Attorney Louis Franklin. (Doc 9.) The Government filed a "Motion to Unseal Case" on that same day, (Doc 5), and Magistrate Judge Coody signed an Order unsealing the May 17, 2005 indictment. (Doc 6.)

Argument and Legal Authorities

A. THE INDICTMENT MUST BE DISMISSED BECAUSE THE GOVERNMENT MISLED THE MAGISTRATE JUDGE AND REPEATEDLY MADE FALSE REPRESENTATIONS TO DEFENSE COUNSEL TO INDUCE COUNSEL TO REVEAL CONFIDENTIAL FACTS AND LEGAL THEORIES.

Between May of 2005 and October of 2005, the Government intentionally misled Defendant Scrushy's counsel as to whether a charging decision had been made. It did so not for Defendant Scrushy's protection, as it argued in its original motion to seal the

indictment, but for tactical litigation advantages. It used the five months between the original indictment on May 17, 2005 and the first superseding indictment on October 26, 2005 to interview witnesses and investigate its case against Defendant Scrushy. In regard to Mr. Scrushy individually, the Government went even further: it pressured him to cooperate with the prediction of indictment even though he already had been indicted, and it used that same tactic, in conjunction with a deliberate misrepresentation that no charging decision had been made, to trick Defendant's counsel into engaging in negotiations during which the Government elicited highly material facts from counsel, as well as their theory of Mr. Scrushy's defense against those charges that counsel had developed—counsel to which Defendant Scrushy was constitutionally entitled once the original indictment was filed. *See Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938). Therefore, the indictment in this case must be dismissed.

A critical component of the Government's ruse was the sealing of the May 17, 2005 indictment. The Government may request that the magistrate judge seal an indictment where "public interest requires it" or "for sound reasons of public policy." *United States v. Edwards*, 777 F.2d 644, 648 (11th Cir. 1985), *citing United States v. Southland*, 760 F.2d 1366, 1379, 1380 (2d Cir. 1985). Moreover, great deference normally is given to a magistrate judge's decision to seal an indictment as the Government should be able to rely on that decision without risking a later dismissal. *Id.* That deference, however, is misplaced in this case.

When Magistrate Judge Coody ordered that the May 17, 2005 indictment be sealed, he relied on the Government's motion, which cited at least one reason of public interest: the protection of a defendant who was on trial at the time the indictment was

returned. (Doc 1, ¶ 4.) Magistrate Judge Coody was entitled to rely on the reason, which was proffered in a document signed by an officer of the Court, Acting Assistant United States Attorney Louis V. Franklin, Sr. (*Id.* at 2.) On June 28, 2005, that reason ceased to exist when a jury acquitted Mr. Scrushy of the charges against him in the Northern District of Alabama. Yet the Government did not move to lift the seal or otherwise notify the Magistrate Judge of the change in circumstances.[2]

The Government's second reason—continued investigation of *other* criminal offenses—can be legitimate in some circumstances, but was not in this case. In *Edwards*, the Government had to indict on drug charges before the statute of limitations ran. 77 F.2d at 648-49. It moved to seal the indictment so it could continue to investigate separate tax charges and because it was afraid the defendants would flee in the interim. Here, there was no danger of Defendant Scrushy fleeing the jurisdiction, and no such allegation in the Government's motion to seal. More significantly, the Government did not continue to investigate *other* criminal offenses—it merely worked to attempt to strengthen its evidence on the three existing charges. It is well-settled that the Government may not use the grand jury for the primary purpose of strengthening its case on a pending indictment. *See United States v. Alred*, 144 F.3d 1405, 1413 (11th Cir. 1998); *United States v. Beasely*, 550 F.2d 261, 266 (5th Cir. 1977).

Moreover, the Government never informed the Magistrate Judge of its real purpose in moving to seal the May 17, 2005 indictment—to gain extra time in which to continue to re-interview witnesses and thereby strengthen its case. Because the

[2] The Government's subsequent misrepresentations to Defendant Scrushy's counsel that a charging decision had not been made are particularly ironic in light of its assertion to the Magistrate Judge that it was sealing the indictment to protect the Defendant. (Doc. 3, ¶ 4.)

Government misled the Magistrate Judge, the Magistrate Judge was, unbeknownst to him, exercising discretion over nonexistent facts. In those circumstances, through no fault of the Magistrate Judge, the exercise of discretion is necessarily meaningless and cannot be entitled to deference. *See, e.g., United States v. Cross*, 928 F.2d 1030, 1040 (11th Cir. 1991) (no deference to decision made based on misleading information); *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000) (same); *United States v. Conley*, 85 F.Supp.2d 1034, 1043 n.11 (W.D. Pa. 1994) (logic dictates that affiant forfeits deference afforded the magistrate's determination of probable cause when magistrate has been misled).

Rather than review the Magistrate Judge's May 17, 2005 Order with deference, this Court should review it as the Eleventh Circuit Court of Appeals reviewed the search warrant in *Cross*, where the affidavit contained misleading statements. First, the Court excises the misleading facts from the motion to seal—the protection of Richard Scrushy and the continued investigation of other charges—and adds the omitted facts—the Government's desire to strengthen its case by pressuring witnesses to change their stories. 928 F.2d at 1040. Then, the Court reviews the motion to seal *de novo*. *Id.* Moreover, the Court should not rely on any new reasons the Government might put forth to justify sealing the indictment. *See United States v. Wright*, 343 F.3d 849, 858 (6th Cir. 2003). Instead, the Court looks only to the non-misleading reasons presented on May 17, 2005 in support of its motion to seal. *Id.*

Applying these standards, it is clear that the indictment never should have been sealed, or any sealing should have ended upon Mr. Scrushy's acquittal on June 28, 2005. Once the Government's misleading reasons are removed from its motion, there are no

reasons remaining. Federal Rule of Criminal Procedure 6(e)(4) grants the courts broad grounds to seal an indictment, but giving the Government an extra five months to re-interview witnesses and to make an end run around the Sixth Amendment by deliberately misleading Defendant Scrushy's counsel into revealing critical facts not otherwise available to the Government and defense strategy are not among them. The Government misled the Magistrate to achieve a blatant violation of Rule 6(e)(4), and used the improperly obtained Order sealing the indictment to trick Defendant Scrushy's lawyers into revealing confidential information.

The Government's violation of Rule 6(e)(4) is reviewed for harmless error under Fed. R. Crim. P. 52(a). *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255, 108 S.Ct. 2369, 2373-74 (1988). Rule 52(a) requires this Court to disregard the prosecutorial misconduct in moving to seal the indictment unless misconduct affected the defendant's "substantial rights." *See United States v. Thompson*, 287 F.3d 1244, 1252-53 (10th Cir. 2002). Although harmless error typically is assessed after a trial, when a case involves improper sealing of the indictment, it is appropriate for the Court to assess pretrial whether "the sealing violation substantially affected the defendant's ability to defend against the charges." *Id.* at 1254.

The Government's misconduct in this case—both in misleading the Magistrate Judge and deliberately misrepresenting a known fact to defense counsel—caused real and measurable prejudice to Defendant Scrushy. *See United States v. Accetturo*, 858 F.2d 679 (11th Cir. 1988) (defendant must show actual prejudice from government misconduct for indictment to be dismissed). First, while the May 17, 2005 indictment was under seal, reports of interviews already furnished in discovery demonstrate that the Government

brought in numerous witnesses for interviews and re-interviews. The Government's tactics in its dealings with Defendant Scrushy's lawyers supports a strong inference that the Government's meetings with witnesses—especially witnesses similarly situated to Defendant Scrushy where the Government was seeking testimony to support the Government's version of transactions which allegedly occurred with co-Defendant Siegelman—were designed to strengthen the case which the Government had already indicted. When questioning Defendant Scrushy's counsel in this case, the Government attorneys repeatedly tried to have counsel confirm the Government's version of the facts rather than simply present Defendant Scrushy's version. The Government told counsel that if Defendant Scrushy could not remember the facts the way it wanted them remembered, he could "expect to be indicted." EXHIBIT A, ¶ 6. This conduct supports an inference that the Government attorneys behaved in a similar manner with other important witnesses.

The Eleventh Circuit Court of Appeals specifically censured this type of pressure in *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987). There, the defendant's accountant had not given the answers the government wanted. The agent told the accountant that if he did not cooperate against the defendant, he would soon be the defendant's co-defendant. *Id.* at 153. The accountant then changed his story and began cooperating. *Id.* at 153-54. The Eleventh Circuit found substantial interference with the defendant's rights and reversed his conviction. *Id.*; *accord United States v. Hammond*, 598 F.2d 1008, 1012-13 (5th Cir. 1979) (government statement to witness that he would have "nothing but trouble" if he continued to testify for defendant required reversal); *see also Webb v. Texas*, 409 U.S. 95, 97-98, 93 S.Ct. 351, 353 (1972) (defendant denied due

process where trial judge singled out sole defense witness to admonish about the dangers of perjury and witness thereafter refused to testify).

Second, and resulting in even more compelling prejudice to Defendant's ability to defend himself against the Government's charges, the Government attorneys made deliberate misrepresentations that "no charging decision had been made" despite their actual knowledge of the existence of a sealed indictment naming Defendant Scrushy. These misrepresentations were at the heart of a ruse to convince Defendant Scrushy to authorize his counsel to lay out his entire case in advance of trial. Defendant Scrushy's attorneys had repeated conversations with Government attorneys about the very facts contained in the sealed indictment. These conversations occurred for one reason and one reason only: because the Government attorneys told defense counsel that a charging decision had not been made, even though they knew full well that the grand jury had returned an indictment on May 17, 2005. Equipped with this ill-gotten intelligence, the Government could accomplish two improper goals. First, by knowing what Defendant Scrushy would say as to key transactions and events, the Government also knew which witnesses the Defendant would call at trial. Perhaps more importantly, the Government had a road map to weaknesses in its case, and contradictions in the testimony of its witnesses against Defendant Scrushy—and therefore which witnesses it needed to re-interview and the specific facts that needed to be revisited prior to unsealing the indictment. This misconduct and the prejudice it has caused Defendant Scrushy have deprived him of his ability to effectively defend against the instant charges, and require that the indictment be dismissed.

B. THE INDICTMENT MUST BE DISMISSED BECAUSE THE DELAY IN UNSEALING THE INDICTMENT VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS.

The Government delayed unsealing the indictment in this case for more than five months, and it did so deliberately to gain a tactical advantage over Defendant Scrushy. As discussed above, this delay substantially prejudiced Defendant in his ability to defend against the Government's charges. Defense counsel was duped into revealing privileged information. Based on this information, it is reasonable to infer that witnesses have been interviewed or re-interviewed in order to investigate and rebut the information revealed to the Government by Defendant's counsel. The deliberate delay and resulting prejudice require that the indictment be dismissed.

When the Government deliberately delays indicting a defendant to gain a tactical advantage and that delay causes the defendant prejudice, the defendant's due process rights are violated, and the indictment must be dismissed. *See, e.g., United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996). Bad faith on the Government's part—that is, acting to delay in the hope that the delay in and of itself would prejudice the defendant—is not necessary to find a due process violation. *Id.* at 1223 n.2. As the Eleventh Circuit Court of Appeals has noted, "[t]he critical element is that the government makes a judgment about how it can best proceed with litigation to gain an advantage over the defendant and, as a result of that decision, an indictment is delayed." *Id.*

If the Government had decided in May 2005 to indict Defendant Scrushy and had deliberately refrained from so doing until October 26, 2005, to gain a tactical advantage over Defendant, then this case would fit squarely within the line of cases that prohibit the

Government from deliberately delaying indictment to gain a tactical advantage over a defendant. *See id.* at 1222-23 (government waited until other defendants had been convicted and could be given immunity; defendant lost witnesses and evidence in the interim; case remanded to determine whether there was a due process violation); *United States v. LeQuire*, 943 F.2d 1554, 1560 (11th Cir. 1991) (indictment must be dismissed when prejudice from deliberate delay impairs the fairness of the trial).

That the Government chose here instead to indict Defendant Scrushy and then have the indictment sealed is no reason for this Court to treat the delay in unsealing the indictment more leniently than it would a delay in bringing the indictment. Indeed, given that the Government misled the Magistrate Judge to have the indictment sealed and then used that sealing Order to deliberately mislead defense counsel about the existence of the indictment, there is reason for this Court to treat these circumstances less leniently. The Government purposefully delayed letting Defendant Scrushy know he had been indicted to gain a tactical advantage over Defendant, and the deliberate delay worked: the Government has learned Defendant Scrushy's factual and legal defense and has had the time to adjust accordingly. Defendant Scrushy has suffered substantial prejudice in his ability to effectively defend against the instant charges. The Government's course of conduct is a flagrant violation of Defendant's due process rights and the indictment should be dismissed.

WHEREFORE, Defendant Scrushy respectfully prays that this Court conduct an evidentiary hearing into the circumstances surrounding the sealing to the May 17, 2005 indictment, the delay until October 26, 2005 in unsealing that indictment, and the conduct of the Government in meetings and discussions with counsel for Defendant and counsel

for witnesses and individuals who were subjects of the investigation in the period between May 17, 2005 and October 26, 2005, and after that period to the extent such interviews continued after that time, and, upon good cause shown, enter an Order dismissing the indictment in this case, and for such other and further relief as this Court may deem just and proper.

This 13th day of February, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2006, I electronically filed the foregoing "Defendant Richard M. Scrushy's Motion to Dismiss Indictment Because of Prosecutorial Misconduct and Delay in Unsealing the Indictment" with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 2:05cr119-F**
	)	
RICHARD M. SCRUSHY,	)	
Defendant.	)	

RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON GROUNDS OF PROSECUTORIAL MISCONDUCT AND DELAY IN UNSEALING THE INDICTMENT

Comes now the United States of America, by and through Louis V. Franklin, Sr., Acting United States Attorney for the Middle District of Alabama, and Andrew C. Lourie, Acting Chief of the Public Integrity Section of the Criminal Division of the United States Department of Justice, to respond to defendant Scrushy's motion to dismiss the superseding indictment on grounds of prosecutorial misconduct and delay in unsealing the original indictment. Doc. No. 132 (filed February 13, 2006). Defendant Scrushy asserts that dismissal of the superseding indictment is warranted because he claims he was prejudiced by what he asserts was the improper sealing of the original indictment, improper delay in unsealing that indictment, and improper maintenance of that secrecy when defense

counsel approached prosecutors to discuss Mr. Scrushy's possible cooperation. Defendant Scrushy's assertions are without merit. The record shows that sealing the original indictment was justified, that it remained justified during the period complained of, and that Mr. Scrushy was not prejudiced by not being informed of the existence of the sealed indictment.

Statement of Facts

On May 17, 2005, a grand jury returned an indictment in the Middle District of Alabama, Northern Division, charging Don Eugene Siegelman and Richard M. Scrushy with federal-funds bribery in violation of 18 U.S.C. 666 and with conspiracy in violation of 18 U.S.C. 371 to commit that bribery and to engage in money laundering (18 U.S.C. 1956) of the proceeds of that bribery. On the same day, the government moved the district court to seal that indictment on two grounds: (1) because Mr. Scrushy was then "being tried in the Northern District of Alabama in a complex, high profile case" and sealing the indictment was justified to "prevent and preclude any undue prejudice to this defendant in the ongoing trial," Doc. No. 1 ¶ 4; and (2) because the "United States, in conjunction with the Attorney General of the State of Alabama, [was] continuing to investigate other criminal offenses committed by the named defendants as well as other persons known and unknown at this time" and "[p]ublic disclosure of the instant

indictment * * * would severely harm the investigative efforts of the United States and the State of Alabama," id. ¶5. United States Magistrate Judge Charles S. Coody ordered the indictment sealed that same day, May 17. Doc. No. 2.

On June 28, 2005, Mr. Scrushy was acquitted of the charges in the Northern District of Alabama. Because the government's investigation of other crimes involving Messrs. Scrushy and Siegelman, and others, was still ongoing in the Middle District, and a sitting grand jury was hearing witnesses relating to those other crimes and persons, the indictment remained sealed. Franklin Aff. ¶ 14 (Aff. attached as Exh. A); Pilger Aff. ¶¶ 5, 6 (Aff. attached as Exh. B).

In late September 2005, defense counsel for Mr. Scrushy, aware that a grand jury investigation was underway in the Middle District involving Mr. Scrushy, approached the prosecution to determine whether there might be a basis for their client's cooperation to avoid prosecution. Franklin Aff. ¶ 15. On October 4, defense counsel met with prosecutors at the United States Attorney's Office in Montgomery. Present on behalf of Mr. Scrushy were attorneys Arthur W. Leach, Henry Lewis Gillis, Christopher Whitehead, and Les Moore; present on behalf of the prosecution were Acting United States Attorney Louis V. Franklin, Sr., Assistant United States Attorney James B. Perrine, Richard Pilger of the Public Integrity Section of the Criminal Division of the U.S. Department of Justice, and

Joseph Fitzpatrick of the Alabama Attorney General's Office. Franklin Aff. ¶ 16; Pilger Aff. ¶ 7.

At defense counsel Leach's request, the prosecutors explained, as they had on prior occasions, the relevant facts learned during the investigation that led them to believe that Mr. Scrushy had committed criminal offenses. Franklin Aff. ¶¶ 5, 10, 16; Pilger Aff.¶ 9. Defense counsel did not present any exculpatory information or reveal any detail of a defense strategy. Franklin Aff. ¶ 16; Pilger Aff. ¶ 10. Rather, defense counsel Leach probed government counsel with questions. Franklin Aff. ¶ 16; Pilger Aff. ¶ 9.

At no time did government counsel state that Mr. Scrushy would be indicted or prosecuted if he refused to testify as the government wanted him to testify. Pilger Aff. ¶ 13. Rather, when defense counsel Leach stated that he believed this was the government's position, government counsel Pilger specifically corrected his mischaracterization, explaining that Mr. Scrushy would, like every cooperator, be required to testify fully and truthfully by any cooperation agreement. Ibid.

When defense counsel Leach asked a question about the status of the government's charging decision, the context was discussion of whether the government was amenable to negotiations about Mr. Scrushy's possible cooperation pursuant to a non-prosecution agreement. Pilger Aff. ¶ 11. The

government's response sought to convey to defense counsel that the government remained open to considering a non-prosecution proposal from Mr. Scrushy's counsel, without violating the seal of the original indictment by divulging that Mr. Scrushy had been indicted in May to protect against the running of the statute of limitations. Ibid.[1]

Mr. Leach called government counsel Pilger a day or two after the October 4 meeting to advise that he would be meeting with Mr. Scrushy and to ask whether the government would be willing to provide legal authorities for Mr. Leach's use with his client. Pilger Aff. ¶ 15. Mr. Pilger provided the name of a leading case, but declined to further address the matter. Ibid.

On October 7, Mr. Leach initiated a telephone call to Acting United States Attorney Franklin. Mr. Leach expressed an interest in avoiding prosecution of Mr. Scrushy, and offered that if he was not prosecuted he would decline to be a witness in Mr. Siegelman's defense, but Mr. Leach did not suggest that Mr.

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[1] The quotation provided in paragraph 7 of Leslie V. Moore's affidavit in support of defendant's motion to dismiss, stating that Mr. Leach asked, "Has a charging decision been made?," and that Mr. Pilger answered simply "No," does not accord with the recollection of government counsel of the conversation, nor does it accord with the purpose, nature, and context of the discussion. Pilger Aff. ¶ 11. As discussed infra, however, this is not a material factual issue, because there was no intentional misconduct by the government and the defense has not shown and cannot show any prejudice to it resulting from any misunderstanding about Mr. Scrushy's indictment status.

Scrushy would be willing to cooperate with the government. Franklin Aff. ¶ 17.

On October 25, Mr. Leach again called Mr. Franklin. During that conversation, when Mr. Leach asked Mr. Franklin whether a charging decision had been made, Mr. Franklin may have responded that a decision had not yet been made. Franklin Aff. ¶ 18. This reflected the fact that Mr. Franklin at that time was awaiting the final decision of the Criminal Division as to what charges should be included in the superseding indictment that the government intended to present to the grand jury. Ibid.

The next day, after the Criminal Division had authorized which charges the prosecutors might submit to the grand jury, a more comprehensive superseding indictment was returned by the grand jury. Doc. No. 9. That superseding indictment added Paul Michael Hamrick and Gary Mack Roberts as additional defendants and expanded the charges from two counts of bribery and one count of conspiracy involving only Messrs. Scrushy and Siegelman to 30 counts involving racketeering (18 U.S.C. 1962), bribery (18 U.S.C. 666), mail and wire fraud (18 U.S.C. 1341, 1346), obstruction of justice (18 U.S.C. 1512), and extortion (18 U.S.C. 1951). In addition to the bribery offenses charged against Mr. Scrushy in the initial indictment, he was charged in the superseding indictment with mail fraud. Doc. No. 9, Ct. 5. In addition to the bribery offenses charged against Mr.

Siegelman in the original indictment, he was charged in the superseding indictment with racketeering, mail and wire fraud, obstruction of justice, and extortion.

On the same day that the grand jury returned the superseding indictment, October 26, 2005, the government filed a motion to unseal the case, which was granted that same day by Magistrate Judge Coody. Doc. Nos. 5, 6. A second superseding indictment was returned on December 12, 2005, naming the same four defendants, and charging Mr. Scrushy in seven counts, including two counts of bribery, one count of conspiracy, and four counts of wire fraud. Doc. No. 61, Cts. 3-9.

Argument and Legal Authorities

Defendant Scrushy argues that the superseding indictment should be dismissed. He claims (Mot. 4-8) that there never was a valid reason for sealing the original indictment and in any event that the indictment should have been unsealed when Mr. Scrushy was acquitted of charges in the Northern District of Alabama. He argues (Mot. 9-10) that the prosecutors misled defense counsel about Mr. Scrushy's indictment status with the purpose of tricking defense counsel into divulging the defense strategy. Finally, he argues (Mot. 11-12) that the delay in unsealing the original indictment violated his due process rights. Contrary to

these arguments, the record shows that there was a valid basis for sealing the original indictment and that a justification for sealing it continued until the superseding indictment was returned. During the October 2005 discussions, government counsel attempted to carefully communicate to defense counsel that no final prosecution decision had been made, but government counsel were not at liberty to violate the sealing order by informing defense counsel that an indictment had been returned to satisfy the statute of limitations on certain offenses. There was no intention to prejudice the defense, and the defense was not, in fact, even colorably prejudiced by anything said by government counsel.

1. The Original Indictment Was Properly Sealed for the Entire Period Between May 17, 2005, and October 26, 2005.

The Eleventh Circuit has held, as have numerous other courts of appeals, that indictments may be sealed "[w]here the public interest requires it, or for other sufficient reason, or for sound reasons of policy." United States v. Edwards, 777 F.2d 644, 648 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1123 (1986); see United States v. Thompson, 287 F.3d 1244, 1252 (10th Cir. 2002) (indictment may be sealed for "legitimate prosecutorial purposes and when the public interest otherwise requires it"); United States v. Sharpe, 995 F.2d 49, 52 (5th Cir.) (sealing proper for "any legitimate prosecutorial objective or where the

public interest otherwise requires it"), cert. denied, 510 U.S. 885 (1993); United States v. Richard, 943 F.2d 115, 119 (1st Cir. 1991) (same); United States v. Lakin, 875 F.2d 168, 172 (8th Cir. 1989) (same).

Defendant accepts (Mot. 5-6) that the prevention of unnecessary prejudice to Mr. Scrushy in connection with his then-ongoing trial in the Northern District of Alabama was a legitimate reason for sealing the indictment. He argues (Mot. 6), however, that sealing was not justified by the government's second reason – that it had an ongoing investigation into other crimes by the defendants named in the sealed indictment and by other persons. Defendant's argument has been rejected by the Eleventh Circuit and by other courts of appeals. In Edwards, the government returned an indictment on some charges in order to satisfy the expiring statute of limitations for those charges, but requested sealing of the indictment while it continued to investigate other charges. The Eleventh Circuit upheld that reason for sealing the indictment. 777 F.2d at 648-649. Other courts of appeals have done likewise. United States v. Wright, 343 F.3d 849, 858 (6th Cir. 2003) ("need to avoid compromising an ongoing investigation falls within the range of permissible reasons for sealing an indictment"); United States v. Bracy, 67 F.3d 1421, 1426-1427 (9th Cir. 1995) ("ongoing nature of [government's] investigation" is legitimate reason for sealing indictment); Richard, 943 F.2d at

119 (sealing proper when "significant new information concerning the alleged drug conspiracy came to the attention of the government which required further investigation"); Lakin, 875 F.2d at 170 (indictment sealed because, although government "had probable cause to indict defendants, it needed more time to gather additional evidence to determine whether the case should be pursued").

It is apparent on the face of the original indictment that the government sought its return at the time when it did because the statute of limitations was soon to expire on those charges. The last overt act of the alleged conspiracy to commit bribery and money laundering was the alleged use by Mr. Siegelman of $250,000 in bribe money to reduce a debt on or about May 23, 2000. Doc. No. 1 ¶ 25. The alleged substantive federal-funds bribery offenses likewise allege the last act on or about May 23, 2000. Id. ¶¶ 27, 29. The indictment was filed on May 17, 2005, just within the five-year statute of limitations provided for by18 U.S.C. 3282(a). It is likewise apparent on the face of the superseding indictment filed on October 26, 2005, that the government had been continuing to investigate other crimes involving Mr. Siegelman and Mr. Scrushy, and other crimes involving other persons. Doc. No. 9. The superseding indictment added two new defendants and added a new charge against Mr. Scrushy and numerous new charges against Mr. Siegelman. The court can satisfy itself from the records of the grand jury that it

was continuing to hear witnesses between June 2005, when Mr. Scrushy was acquitted, and October 2005, when the superseding indictment was returned.

Defendant faults the government (Mot. 6) for not informing the magistrate judge that Mr. Scrushy was acquitted in June 2005 and not at that time reapplying to keep the indictment sealed. There was no requirement for the government to do so. United States v. Balsam, 203 F.3d 72, 81 (1st Cir.) (rejecting argument that "government should have returned to court to inform the magistrate judge of its new objective" for sealing the indictment), cert. denied, 531 U.S. 852 (2000); United States v. Ramey, 791 F.2d 317, 318 (4th Cir. 1986) (finding "no authority for the implied proposition that the government must return to the magistrate judge as each new reason for continuing the sealing order arises"). Indeed, there is no requirement for the government to articulate to the magistrate judge any specific reason for sealing the indictment; rather, it is sufficient if the government provides an adequate reason for sealing the indictment in response to a motion to dismiss after the indictment is unsealed. Balsam, 203 F.3d at 81; Sharpe, 995 F.2d at 52; United States v. Srulowitz, 819 F.2d 37, 41 (2d Cir.), cert. denied, 484 U.S. 853 (1987); Lakin, 875 F.2d at 171-172.[2]

[2] This accords with our understanding of the practice in the Middle District of Alabama, where the magistrate judges generally do not require the government to articulate the specific reasons why sealing is sought before the indictment is sealed

Defendant makes the completely baseless claim (Mot. 4-5, 6-7) that the government had no reason to seal the indictment other than to strengthen its case on the charges contained in that indictment. Defendant's claim is defeated by the validity of the government's stated reasons for sealing the indictment. There is no authority for defendant's implied proposition that the government is precluded from preparing its case on the indicted charges during the sealing period.[3] While the government may not use the ongoing grand jury investigation "principally to prepare pending charges for trial," United States v. Flemmi, 245 F.3d 24, 28 (1st Cir. 2001), "accusations of grand jury abuse can be conclusively rebuffed by a showing that the challenged proceedings led to the joinder of new defendants or the inclusion of new charges," id. at 29. Here, the continuing grand jury investigation resulted in additional charges against both Mr. Scrushy and Mr. Siegelman, and the indictment of two additional defendants.

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and magistrate judges do not articulate the reasons for sealing in the sealing order.

[3] Indeed, the need for further investigation of the charges in an indictment may by itself be a sufficient reason to seal it. Richard, 943 F.2d at 119 (sealing proper when "significant new information concerning the alleged drug conspiracy came to the attention of the government which required further investigation"); Lakin, 875 F.2d at 170 (indictment sealed because, although government "had probable cause to indict defendants, it needed more time to gather additional evidence to determine whether the case should be pursued"). In the instant case, however, there was a need for sealing to investigate other offenses involving the indicted defendants and other offenses involving other persons.

Defendant also makes the baseless claim (Mot. 8) that the government used the sealing of the original indictment to trick defense counsel into revealing confidential information. As defense counsel admit (Mot. 2), they were the ones who approached the government in October 2005 for discussions about possible cooperation by Mr. Scrushy. The government did nothing to use the sealed indictment to cause defense counsel to initiate such discussions. As discussed below, when government counsel avoided breaching the seal on the indictment during discussions with defense counsel, government counsel were acting in accordance with the sealing order and accurately communicated to defense counsel that no final prosecution decision had been made. The only context in which the issue of charging decisions or indictments was raised or addressed at the October 4, 2005 meeting was that context sought by the defense in requesting the meeting: to establishing that a good faith negotiation toward a cooperation agreement was possible, which it was.

Accordingly, it is plain from the existing record that the indictment was properly sealed on May 17, 2005, and remained properly sealed until the superseding indictment was returned and the original indictment was unsealed, both on October 26, 2005. This also disposes of defendant's argument (Mot. 11-12) that an improper delay in unsealing the indictment violated his right to due

process. There was no improper delay in unsealing the indictment. The government's reason for sealing continued until the return of the superseding indictment and unsealing of the original indictment.[4]

2. During Discussions with Defense Counsel, Government Counsel Did Not Urge that Mr. Scrushy Should Provide False Testimony, Did Not Misstate the Status of the Government's Charging Decision, and Were Precluded by the Sealing Order from Disclosing the Existence of the Sealed Indictment.

Defendant claims (Mot. 8-9) that government counsel sought to pressure Mr. Scrushy into providing false testimony. Defendant also claims (Mot. 10) that the government intentionally misled defense counsel into believing that Mr. Scrushy had not been indicted and this led defense counsel to prejudice Mr.

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[4] Even if the indictment was improperly sealed or there was an improper delay in unsealing it, defendant would not be entitled to the remedy he seeks unless he showed actual, substantial prejudice arising during a period of improper sealing. E.g, Edwards, 777 F.2d at 649 (11th Cir.) ("indictments maintained under seal beyond the limitations period [will be dismissed] only upon a showing of substantial, irreparable, actual prejudice to the defendants"); United States v. Mitchell, 769 F.2d 1544, 1548 (11th Cir. 1985) (requiring the defendant to "show actual prejudice" resulting from holding the sealed indictment beyond the limitations period), cert. denied, 474 U.S. 1066 (1986). The degree of prejudice must be so substantial that "it substantially influenced a defendant's ability to defend against the charges." Thompson, 287 F.2d at 1254. Defendant Scrushy has made no such showing. His unsupported and baseless claim – discussed infra – that the sealing of the indictment caused him to divulge his defense strategy, even if true, would not prevent him from employing that strategy during trial. The question of prejudice from improper sealing need not be considered, however, because the indictment was at all times justifiably sealed by this Court.

Scrushy by divulging the defense strategy. Contrary to defendant's claims, government counsel never sought to pressure Mr. Scrushy into providing false testimony and never misrepresented, let alone intentionally misrepresented, the status of the decision whether to charge Mr. Scrushy. In any event, Mr. Scrushy's claim that he was prejudiced by his counsel's misunderstanding of the government's intentions or of Mr. Scrushy's indictment status is groundless. No information was disclosed by defense counsel that prejudiced Mr. Scrushy's defense. Without a showing of actual, substantial prejudice to the defense, there is no basis for any remedy, and certainly no basis for dismissing the indictment, regardless of defense counsel's unwarranted claims of government misconduct.

1. Defendant claims (Mot. 5, 9) that government counsel sought to pressure Mr. Scrushy to provide false testimony in support of the government's case. That is not what occurred. At the October 4, 2005 meeting, government counsel, at defense counsel Leach's request, provided a summary of the evidence leading the government to believe that Mr. Scrushy had committed criminal offenses. But the government never sought any false testimony from Mr. Scrushy. Indeed, at the October 4 meeting, when Mr. Leach stated that he thought the government was insisting that Mr. Scrushy agree with the government's version of events, Mr. Pilger expressly rejected that mischaracterization and made it clear that any

cooperation agreement with Mr. Scrushy would call for complete and truthful testimony from him. Franklin Aff. ¶ 16; Pilger Aff. ¶ 13.

Defendant seeks to rely (Mot. 9-10) on United States v. Heller, 830 F.2d 150 (11th Cir. 1987), and United States v. Hammond, 598 F.2d 1008 (5th Cir.), on reh'g, 605 F.2d 862 (1979). Neither case supports defendant's argument. In Heller, the court found that the government directly pressured a witness to provide testimony that was demonstrably false, causing real and substantial prejudice at defendant's trial. 830 F.2d at 152-154. In Hammond, the court found that the government's improper threat to retaliate against a defense witness prejudiced the defendant by causing the witness to refuse to testify further on behalf of the defense. 598 F.2d 1012-1015. The instant case is completely different. Here the government never talked to Mr. Scrushy and any impression by defense counsel Leach that the government was seeking to exert improper pressure on Mr. Scrushy was immediately corrected. The case has not been to trial and Mr. Scrushy can make no claim that the government's conduct will cause him any prejudice whatsoever at trial. Moreover, even in Heller and Hammond, where there was a finding that intentional government misconduct caused the defendant actual prejudice at trial, the remedy was not dismissal of the indictment, but rather remand for trial free from any improper interference by the government with the

defense. Heller, 830 F.2d at 156 (remanding for retrial); Hammond, 598 F.2d at 1014-1015 & n. 6 (remanding for new trial and specifically rejecting remedy of indictment dismissal). Because any possible concern of defense counsel that the government sought to pressure Mr. Scrushy into providing false testimony was immediately addressed and rectified at the October 4 meeting, Mr. Scrushy's trial may proceed without such concern and there is no basis for any remedy, regardless of whether or why defense counsel had a misimpression about the government's intentions.[5]

2. Defendant also argues (Mot. 10) that government counsel made "deliberate misrepresentations" about whether a charging decision had been made with respect to Mr. Scrushy. At the October 4 meeting, the government communicated that it was open to the possibility that Mr. Scrushy would enter into a cooperation agreement with the government that might include a non-prosecution agreement. Franklin Aff. 16; Pilger Aff. ¶ 11. It was in this context that the government communicated that its final prosecution decision had not yet been made. Ibid. This was accurate and reflected the circumstance that the

[5] Because no remedy is appropriate regardless of the basis for any purported misunderstanding by defense counsel, no further hearing is required to resolve immaterial factual disputes concerning what transpired between defense counsel and government counsel.

prosecution decision was still being discussed and decided both within the U.S. Attorney's Office for the Middle District and within the Department of Justice. Because of the sealing order, the government was not at liberty to more fully explain that, although Mr. Scrushy had been indicted in May 2005, that preliminary charging decision – undertaken to protect against the running of the statute of limitations – did not dictate the ultimate prosecution decision. Mr. Scrushy's counsel, of course, was and is well aware that the government can decline to prosecute a defendant on some or all charges at any time if circumstances warrant.[6]

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[6] Defendant also claims (Mot. 3) that defense counsel Leach specifically asked the government to "let Mr. Scrushy testify before the grand jury and tell his story to the grand jurors." This assertion is at best misleading. In a meeting with defense counsel on July 8, 2004, the government offered the opportunity for Mr. Scrushy to come to the grand jury and present his version of the facts, but defense counsel declined. Franklin Aff. ¶ 7. Defense counsel at no time thereafter requested the opportunity for Mr. Scrushy to appear voluntarily before the grand jury. At the October 4, 2005 meeting, defense attorney Leach in passing made a suggestion that the government compel Mr. Scrushy to appear before the grand jury, which government counsel declined. Franklin Aff. ¶ 16. Government counsel noted the possibility that Mr. Scrushy might appear before the grand jury in connection with a cooperation agreement, but such an agreement was not forthcoming. Pilger Aff. ¶ 14. In any event, a target of an investigation, such as Mr. Scrushy, has no right to appear before the grand jury either before or after indictment. United States v. Pabian, 704 F.2d 1533, 1538-1539 (11th Cir. 1983) ("A target of a grand jury investigation has no constitutional right to appear before that grand jury."); United States v. Briggs, 514 F.2d 794, 804 (5th Cir. 1975) ("One indicted by a grand jury has no right to appear before that body, under oath or otherwise.").

In any event, even if government counsel might have formulated a better response about the status of its prosecution decision that would have avoided any misimpression by defense counsel while preserving the secrecy of the indictment, there is no basis for dismissing the indictment without compelling proof of intentional misconduct and a strong showing of actual prejudice. "A district court may dismiss an indictment pursuant to the federal courts' supervisory power. However, dismissal of an indictment for prosecutorial misconduct is an extreme sanction which should be infrequently utilized." United States v. Shelley, 405 F.3d 1195, 1202 (11th Cir. 2005) (internal quotation omitted). The predicates for dismissal are that the "prosecutor engaged in * * * egregious, flagrant misconduct," ibid., and "prejudice to the defendant is an essential element," United States v. O'Keefe, 825 F.2d 314, 318 (11th Cir. 1987); see United States v. Morrison, 449 U.S. 361, 365 (1981) ("absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of defendant's right to counsel] may have been deliberate").

Neither predicate is met here. Whatever misunderstanding defense counsel might have ever actually had about Mr. Scrushy's indictment status was not the result of "egregious, flagrant misconduct" by government counsel. Rather, assuming that such a misunderstanding truly existed, at worst it was the result of

government counsel seeking to avoid violating the court's sealing order while answering defense counsels' question whether a charging decision had been made. The purpose of the communications was to truthfully communicate the government's position on the negotiation underway at the request of Mr. Scrushy's counsel. Even if government counsel might have chosen another way of answering that question, government counsels' conduct was certainly not egregious, flagrant misconduct. On the contrary, the United States has made every effort to let Mr. Scrushy know the nature and extent of its case.

Moreover, defendant has not shown the required prejudice. He claims (Mot. 10) that the purported misimpression defense counsel had about Mr. Scrushy's indictment status caused him to reveal defense strategy to his prejudice. Mr. Scrushy has not been prejudiced in presenting his defense. Even if defense counsel had revealed some evidence injurious to the defendant, he recognizes (Mot. 3 n. 1) that any information divulged by defense counsel during that meeting could not in any event be used by the government at trial pursuant to Fed. R. Evid. 410.[7] Further, the government will not offer at trial any information discussed

[7] Although defendant asserts (Mot. 4) that during an October 25, 2005 telephone conversation with Acting U.S. Attorney Franklin statements were made leading him to believe that no charging decision had been made, he does not assert that any prejudice resulted from that conversation. The superseding indictment was returned the next day.

during any of the meetings or telephone discussions with defense counsel. Indeed, considering that Mr. Scrushy's counsel was unwilling to admit his client's knowing participation in any criminal activity, or make any direct assertion of Mr. Scrushy's position on the allegations of wrongdoing, the government is at a loss to see how it could do so. During the government's meetings with Mr. Leach, he made it clear that he did not know, and could not make a representation about, his client's position on any of the facts revealed by the government.

Dismissal of the indictment is also inappropriate because Mr. Scrushy makes no assertion that government misconduct in any way related to the validity of the indictment. As Circuit Judge Tjoflat discussed in his concurrence in Shelley, supra, dismissal of an indictment is only an appropriate remedy when intentional government misconduct infects the grand jury process. 405 F.3d at 1207 n. 7. Even when actual and intentional government misconduct occurs after indictment – such as knowingly presenting perjured testimony at trial or threatening defense witnesses, which was involved in Heller and Hammond, supra – the remedy is either suppression of the fruits of the misconduct or a new trial free from the misconduct, not dismissal of the indictment. Ibid.; Morrison, 449 U.S. at 365 ("when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information * * *, the

remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted"). If government misconduct during trial interferes with a defendant's ability to present his defense, a new trial is ordered, at which the government is of course aware of that defense. There is no basis for Mr. Scrushy to seek the far greater remedy of indictment dismissal, even if there were some basis to his claim that actual, intentional government misconduct caused him to reveal his defense prior to trial.[8]

[8] Again, because there is no basis for the remedy of indictment dismissal regardless of whether and why defense counsel misunderstood the status of the charging decision, and regardless of what information defense counsel divulged to the government, there is no reason to have any further hearing on this matter to resolve factual disputes.

Conclusion

The defendant's counsel sought and received the government's attention to Mr. Scushy's purported interest in cooperating with the investigation. The government attempted to accommodate Mr. Scrushy in good faith while maintaining this Court's proper sealing of the pending indictment. Any purported misunderstanding by defense counsel concerning the existence of a pending indictment that resulted from the government's effort to communicate its negotiating position was entirely unintentional, and even assuming such a misunderstanding existed, the defendant was never prejudiced by it.

WHEREFORE, the United States asks this Court to deny defendant's motion to dismiss the indictment, Doc. No. 132, on its face, in its entirety, and without further hearing or proceedings.

Respectfully submitted this the 27th day of February, 2006

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**CRIMINAL NO. 2:05-CR-119-F**
DON EUGENE SIEGELMAN	)	
PAUL MICHAEL HAMRICK	)	
GARY MACK ROBERTS, and	)	
RICHARD M. SCRUSHY.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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Exhibit A

EXHIBIT A

DECLARATION UNDER PENALTY OF PERJURY OF LOUIS V. FRANKLIN, SR., IN SUPPORT OF RESPONSE TO MOTION TO DISMISS INDICTMENT

I, Louis V. Franklin, Sr., make the following declaration pursuant to 28 U.S.C. Section 1746:

1. I am an Assistant United States Attorney and have been assigned to the Criminal Division for the Middle District of Alabama since joining the United States Department of Justice in 1990, with one period of private practice from May 1996 to March 1998. I have been Chief of the Criminal Division since September 2001, and Acting United States Attorney for the case of United States v. Siegelman, et. al., No. 2:05cr119-F since January 2003.

2. On June 21, 2004, a special grand jury was empaneled to investigate public corruption during the administration of former Alabama Governor Don Eugene Siegelman. This investigation, as reflected in the second superseding indictment, involved matters of substantial importance to the citizens of the State of Alabama and the United States because it involved evidence amounting to probable cause to find serious misconduct by individuals holding significant positions of public trust. Reporters from various judicial districts began monitoring the courthouse to observe witnesses (and their attorneys) who entered and left the grand jury suite. Articles began appearing in various newspapers around the state. We discussed and decided the government should approach the targets, including Richard M. Scrushy, through counsel, to give them an opportunity to comment on the evidence against them and/or point us to exculpatory evidence, and to let them know we believed from prior experience that a grand jury indictment was very likely.

3. AUSA Stephen Feaga initiated telephone contact with the lead attorneys for both targets because he had had prior professional dealings with them. AUSA Feaga spoke with Doug Jones, attorney for Mr. Siegelman, and Donald Watkins, attorney for Mr. Scrushy. When initial contact was made, Scrushy had already been indicted in a $2.7 billion dollar corporate fraud case in the Northern District of Alabama, and was awaiting trial. Because of the media attention given to the investigation, at the time AUSA Feaga contacted Mr. Jones, Mr. Siegelman knew that he was a target.

The United States did not know at this time whether Mr. Scrushy knew that he was a target.

4. Mr. Feaga and I accepted Mr. Watkins' invitation to drive to Birmingham to meet with him and other members of Mr. Scrushy's Birmingham trial team. On July 8, 2004, we met with attorneys Watkins, Lewis Gillis, and Abbe Lowell at the law offices of Thomas, Means, Gillis and Seay. Although attorneys Arthur Leach and Leslie Moore represented Mr. Scrushy in the Birmingham case, and continue to represent him in the instant case, they did not participate in the meeting.

5. During the meeting, we explained the evidence that had been discovered during the course of the investigation and extended an opportunity to defense counsel to explain to us and to the grand jury why Mr. Scrushy had not committed a crime. Specifically, we told them that we had evidence supported by witness testimony and documents showing that Mr. Scrushy had paid $500,000 to then-Governor Siegelman's Alabama Education Lottery Foundation and the Alabama Education Foundation in exchange for then-Governor Siegelman's appointment of Mr. Scrushy to the position of Vice Chairman of the Certificate of Need Review Board (CON Board). We further disclosed evidecne showing Mr. Scrushy laundered the first of the two $250,000 payments through a Maryland corporation called Integrated Health Services (IHS) to the Alabama Education Lottery Foundation; and we disclosed evidence that the second $250,000 payment was made through HealthSouth Corporation. Within one week after Mr. Scrushy delivered the first $250,000 payment to then-Governor Siegelman, Mr. Scrushy was appointed to and made Vice Chairman of the CON Board. We noted that the evidence supporting these events included witness accounts, Mr. Scrushy's support for Fob James during the 1998 gubernatorial campaign, the CON Board's importance to the interests of Mr. Scrushy and HealthSouth Corporation, and then-Governor Siegelman's failure to disclose in required reports that Mr. Scrushy was the true source of the payment of $250,000 to the Alabama Education Lottery Foundation made through IHS.

6. We were very candid in our responses to questions asked by Mr. Scrushy's attorneys. We informed defense counsel that the investigation was a joint effort involving the USAO-MDAL, DOJ Public Integrity Section and the Alabama Attorney General's Office and each entity would participate in all decision-making processes. There is no doubt that during this meeting we communicated to defense counsel that Mr. Scrushy was very likely to be indicted unless some agreement were reached between him and the United States.

7. Defense counsel's response to our presentation was that Mr. Scrushy had committed no crime. However, they requested an opportunity to discuss our presentation with their client and revisit these issues at a second meeting should they decide to do so. They also requested that a representative from the Public Integrity Section of DOJ be present at the next meeting. Before the meeting ended, we told Mr. Scrushy's attorneys that because of the status of the case in Birmingham, we would not make any public announcement of an indictment before the trial in Birmingham ended. They expressed appreciation for our taking the time to drive to Birmingham and give them the opportunity to address the concerns of the investigation at that point. Our offer for Mr. Scrushy to testify before the grand jury was declined.

8. A similar meeting was held with attorneys for Mr. Siegelman. Meanwhile, the special grand jury continued its investigation.

9. During July 2004, we telephonically discussed with counsel for both targets an agreement to toll the running of the statute of limitations, since such an agreement would give them more time to present information that would contradict or shed additional light on the evidence we told them about during our initial meetings. On July 12 and 13, 2004, the United States entered into separate 30-day tolling agreements with both targets. The tolling agreement with Mr. Scrushy expressly stated that its purpose was "to permit the U.S. Attorney's Office and Public Integrity Section to complete its investigation and in order to allow Mr. Scrushy to fully present any information he has . . . ." Neither tolling agreement was extended and it was communicated to attorneys for both targets that an indictment relating to the matters discussed was a likelihood. During the conversations between the attorneys regarding the execution and possible extension of the tolling agreements, the attorneys for the government and the targets discussed the statute of limitations issues and the dates on when the statute of limitations might expire. At a meeting that took place after Mr. Scrushy was indicted in May 2005, Mr. Leach asked about the statute of limitations and was told by me that "we do not have a statute of limitations problem."

10. On August 3, 2004, before the tolling agreement expired, a second meeting with Mr. Scrushy's attorneys was held at the USAO in MDAL. At Mr. Scrushy's counsels' request, Noel Hillman, Chief of the Public Integrity Section, attended the meeting. Representing the government was Chief Hillman, myself, AUSA Feaga, AUSA J.B.Perrine and SAUSA John Gibbs (Alabama Attorney General's Office).

Attorneys Lowell, Watkins and Gillis appeared on behalf of Mr. Scrushy. This meeting was much like the first – the attorneys made general arguments about the law and Mr. Scrushy's attorneys reasserted that Mr. Scrushy would not have made any public payment of money to the Alabama Education Lottery Foundation because of the Christian beliefs of his wife. At no point in this meeting did Mr. Scrushy's attorneys provide us with any information that was of any evidentiary value.

11. I learned from newspaper accounts that in late November 2004, attorney Lowell withdrew as attorney of record for Mr. Scrushy and neither I nor any other member of the prosecution team had any further conversations with attorney Lowell regarding this case.

12. I was aware that Mr. Scrushy's trial in Birmingham began in January 2005.

13. On May 17, 2005, while Mr. Scrushy's Birmingham trial was ongoing, the special grand jury returned a three count indictment against Mr. Siegelman and Mr. Scrushy. Both were charged with conspiracy and two counts of federal funds bribery. The Court granted the government's motion to seal the case. Two reasons were presented in support of the motion to seal. Paragraph "4"of the motion stated: "[O]ne of the defendants charged in the indictment is presently being tried in the Northern District of Alabama in a complex, high profile case." Paragraph "5" of the motion stated: "[T]he United States, in conjunction with the Attorney General of the State Alabama, is continuing to investigate other criminal offenses committed by the named defendants as well as other persons known and unknown at this time."

14. I was aware that Mr. Scrushy's trial ended on June 28, 2005. The special grand jury continued its investigation. In April 2005, we had begun the process of seeking permission from the Organized Crime and Racketeering Section of the DOJ (OCRS) to supersede the indictment and add RICO and RICO conspiracy charges as to Mr. Siegelman and Paul Hamrick, former Chief of Staff during then-Governor Siegelman's administration. The grand jury was also investigating then-Governor Siegelman's appointment of Mr. Gary Mack Roberts to the position of Director of the Alabama Department of Transportation, as well as other matters related to public corruption during then-Governor Siegelman's administration.

15. On September 29, 2005, I received an unexpected telephone call from defense attorney Gillis requesting a meeting. We met at my office for approximately one hour. During that meeting, we discussed the possibility of resolving the government's case against Mr. Scrushy. I did not tell Mr. Gillis that a sealed indictment against Mr.

Scrushy existed. Although no promises were made, I was left with the impression that Mr. Scrushy was willing to negotiate toward a cooperation agreement with us. I understood that if we had any conversation directly with Mr. Scrushy it would be pursuant to a proffer agreement, and that we would have to address the sealed indictment and the fact that he was indicted. Pursuant to Mr. Gillis' request, we planned another meeting for the upcoming week. In a subsequent telephone conversation prior to October 4, 2005, Mr. Gillis told me that Mr. Scrushy would not be attending the upcoming meeting, but that he (Mr. Gillis) and other members of the trial team wanted to come and talk to the prosecutors. We agreed to meet once again with Mr. Scrushy's attorneys.

16. On October 4, 2005, I along with AUSA Perrine, Trial Attorney Richard Pilger (DOJ Public Integrity Section), and SAUSA Joseph Fitzpatrick (Alabama Attorney General's Office) met with attorneys Gillis, Leach, Moore and Chris Whitehead. AUSA Feaga was not present for this meeting. We expected to discuss a cooperation agreement and get an attorney proffer from defense counsel. In fact, the purpose of the meeting was to give Mr. Scrushy an opportunity, through his attorneys, to ensure that any information Mr. Scrushy wanted to be considered would be considered; and to pursue the potential for working out a cooperation agreement. However, the meeting began with defense counsel's request for us to once again go through the evidence we had gathered against Mr. Scrushy and we did. At some point, attorney Pilger asked what information Mr. Scrushy would provide, and even after attorney Pilger acknowledged that attorney Leach's response could not be used against Mr. Scrushy, we were not provided any information that was of any evidentiary value.

I recall attorney Pilger informing Mr. Scrushy's attorneys, in response to a question about what would happen if there was no cooperation agreement, that their client could expect to be indicted, which I understood to be a truthful statement of our good faith negotiating position on whether Mr. Scrushy genuinely faced prosecution under the full range of possible charges we had just discussed with Mr. Scrushy's counsel. When defense counsel accused the government of taking the position that Mr. Scrushy would be indicted if he refused to testify as the government wanted him to, attorney Pilger expressly stated that, as in every potential cooperator's case, Mr. Scrushy would be required by any cooperation agreement to testify fully and truthfully. I understood that all of my own and attorney Pilger's remarks to be solely designed to communicate that we would in good faith consider any proposal Mr. Scrushy's counsel wished to make, including a possible non-prosecution agreement as to all of the pending and possible charges.

During this meeting, in the context of the attorneys for the parties discussing the possibility of a cooperation agreement involving Mr. Scrushy, attorney Leach, in passing, made a suggestion that the government compel Mr. Scrushy to appear before the grand jury. We declined because we were not prepared to offer Mr. Scrushy immunity, which would be necessary to compel his testimony. Mr. Leach never made a request for Mr. Scrushy to appear before the grand jury as an ordinary witness.

Again, there was no attorney proffer presented during this meeting. I do not recall attorney Leach asking if a charging decision had been made; however, if he did, any answer from the prosecutors must be put in context. When this meeting occurred, the government had not yet decided to present a comprehensive superseding indictment to the grand jury. In other words, it was entirely within the realm of possibility that if Mr. Scrushy had agreed to give a complete and truthful proffer, we were willing to consider unsealing and dismissing the previously-returned indictment. Once again, this meeting ended with the United States having extended Mr. Scrushy an olive branch and Mr. Scrushy's counsel offering nothing.

17. On October 7, 2005, while driving back from the National Advocacy Center in South Carolina, I received an unexpected telephone call from attorneys Leach and Moore. During our conversation, attorney Leach spoke in generalities without giving any specific information of any evidentiary value, and prefaced his comments with the caveat that anything he said during our conversation should not be considered as an official proffered statement because he did not want to say anything that would interfere with reaching a cooperation agreement. Also, attorney Leach proposed that if the government would refrain from charging Mr. Scrushy, his client would not testify at a trial of Gov. Siegelman. Further, to ensure that Mr. Siegelman would not call Mr. Scrushy as a witness, attorney Leach stated that he would call Mr. Siegelman's attorneys and tell them that if they called Mr. Scrushy as a witness, Mr. Scrushy would not be helpful to their defense. Again, it was obvious that attorney Leach did not have any intention of giving an attorney proffer or presenting Mr. Scrushy for a proffer meeting. I told the other prosecutors about this conversation on the following Tuesday, October 11, 2005. We continued to work on, and seek permission to present, a superseding indictment to the grand jury.

18. On October 25, 2005, while finalizing the proposed superseding indictment, we continued to accommodate defense attorney requests to meet and discuss the case. At 10:00 a.m. on that day, prosecutors met with Mr. Siegelman's attorneys. I was unable to attend that meeting. During that afternoon, while dealing with an

assortment of issues involving this case, we received another unexpected telephone call from attorneys Leach and Moore. I do not have any specific recollection of what was said during that conversation, except that it was not an attorney proffer nor an offer to have Mr. Scrushy make a proffer to the United States. If in response to a question by attorney Leach inquiring whether a charging decision had been made, I misspoke to the extent of leaving any misimpression about the existence of the original indictment, I intended only to address what was foremost in my mind: the final position from the Criminal Division regarding the superseding indictment, and in the context of agreeing with defense counsel that no cooperation agreement would be forthcoming from Mr. Scrushy. I never had or acted on any purpose to cause any benefit to the government or prejudice to Mr. Scrushy by any inaccurate statement. To the contrary, I always attempted to avoid any misrepresentation while maintaining the Court's seal.

19. Throughout my discussions with defense counsel, I gave them the opportunity to provide information they thought ought to be considered, as well as an opportunity to reach an agreement which would mutually benefit both their client and the United States. At the same time, I was under a duty to respect the Order sealing the indictment. During my conversations with Mr. Scrushy's attorneys, they did not offer evidence that would prejudice their case.

20. I do not recall participating in any other substantive conversations with counsel for Mr. Scrushy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27th 2006, in Montgomery County, Alabama.

Louis V. Franklin, Sr.
Acting United States Attorney
Middle District of Alabama

Exhibit B

EXHIBIT B

DECLARATION UNDER PENALTY OF PERJURY OF RICHARD C. PILGER IN SUPPORT OF RESPONSE TO MOTION TO DISMISS INDICTMENT

I, Richard C. Pilger, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a Trial Attorney in the Public Integrity Section of the Criminal Division of the United States Department of Justice. Since approximately April 2005, I have participated in the investigation and prosecution reflected in United States v. Siegelman et al., No. 2:05cr119-F in the United States District Court for the Middle District of Alabama.

2. On May 17, 2005, a grand jury returned an indictment in the Middle District of Alabama, Northern Division, charging Don Eugene Siegelman and Richard M. Scrushy with federal-funds bribery in violation of 18 U.S.C. 666 and with conspiracy in violation of 18 U.S.C. 371 to commit that bribery and to engage in money laundering (18 U.S.C. 1956) of the proceeds of that bribery. That indictment was returned at that time in order to ensure that the five year statute of limitations provided by 18 U.S.C. 3282(a) would not run on those charges, insofar as the last overt act alleged for both the conspiracy and substantive charges occurred on or about May 23, 2000 (Doc. No. 1 ¶¶ 25, 27, 29).

3. On the day the original indictment was filed, May 17, 2005, the government filed a motion to maintain that indictment under seal for two reasons: (1) because Mr. Scrushy was then "being tried in the Northern District of Alabama in a complex, high profile case" and sealing the indictment was justified to "prevent and preclude any undue prejudice to this defendant in the ongoing trial," Doc. No. 1 ¶ 4; and (2) because the "United States, in conjunction with the Attorney General of the State of Alabama, [was] continuing to investigate other criminal offenses committed by the named defendants as well as other persons known and unknown at this time" and "[p]ublic disclosure of the instant indictment * * * would severely harm the investigative efforts of the United States and the State of Alabama," id. ¶5. United States Magistrate Judge Charles S. Coody ordered the indictment sealed that same day, May 17. Doc. No. 2.

4. I understood that the seal, once ordered by the Court, prohibited the government from disclosing the existence of the sealed indictment without permission of the Court.

5. After the filing of the original sealed indictment, the grand jury continued its investigation of other possible crimes by Mr. Siegelman and Mr. Scrushy, and by other persons. That grand jury investigation continued during the entire period between the return of the sealed indictment on May 17 and the return

of the first superseding indictment on October 26, 2005, Doc. No. 9, which alleged additional offenses against Mr. Siegelman and Mr. Scrushy and against other defendants.

6. On June 28, 2005, Mr. Scrushy was acquitted of the charges in the Northern District of Alabama. Because the government's investigation of other crimes involving Messrs. Scrushy and Siegelman, and others, was still ongoing in the Middle District, and a sitting grand jury was hearing witnesses relating to those other crimes and persons, the indictment remained sealed.

7. On October 4, 2005, I attended a meeting with Acting United States Attorney Louis V. Franklin, other government counsel, and several counsel for Richard M. Scrushy at the United States Attorney's Office in Montgomery, Alabama. I was informed in advance of the October 4 meeting by Acting USA Franklin that Mr. Scrushy's counsel had requested the meeting between lawyers, and that Mr. Scrushy would not be in attendance, nor would investigative agents. I understood that the purpose of the October 4 meeting was, at defense counsel's request, to discuss the possibility of a cooperation agreement between the government and Mr. Scrushy, and to consider any exculpatory information that might dissuade the Department of Justice from prosecuting Mr. Scrushy or any other person for any offense. To the best of my knowledge, between the filing of

the original sealed indictment on May 17, 2005, and this approach by defense counsel, the government sought to contact defense counsel to engage in discussions about a possible cooperation agreement between the government and Mr. Scrushy.

8. At the time of the October 4 meeting, any actual proffer or interview involving Mr. Scrushy himself could not proceed unless steps were taken to inform him of the pending charges. Had negotiations progressed to that point, the United States would not have entered into any proffer agreements or accepted any proffer of information from Mr. Schrushy until obtaining an order from the Court unsealing the indictment and informing defense counsel of its existence.

9. After introductions at the October 4 meeting, at defense counsel's request, the government outlined the information that caused it to believe that Mr. Scrushy had committed criminal offenses, specifically bribery during 1999 and 2000 of then-Governor Siegelman in connection with Siegelman's appointment of Mr. Scrushy to the Alabama Certificate of Need Review Board. Arthur W. Leach, lead counsel for Mr. Scrushy, then pursued a lengthy effort to discover from the government further information about the evidence and the government's legal theories.

10. No information of any kind that might be plausibly useful to the

government or injurious to the defense in any manner of which I am aware was ever provided to us by defense counsel at the October 4 meeting, nor was any agreement of any kind with defense counsel made at that meeting.

11. At the time of the October 4 meeting, the grand jury was still in session. Although part of the case had been indicted so as not to violate the statute of limitations, the United States was open to considering a resolution of the case against Scrushy in a number of ways, including a non-prosecution agreement that called for truthful cooperation. I had a duty during the meeting to avoid disclosure of the existence of the sealed indictment. I specifically recall that defense counsel asked a question about our charging decisions, which related to whether it was even worthwhile for them to engage in discussions with us or their own client about Mr. Scrushy's possible cooperation. Knowing that the grand jury investigation was continuing and we still were willing to consider potential offers from Mr. Scrushy that could have resulted in his truthful cooperation, I replied in a way that intended to make it clear that no final decisions had been made. The quotation provided in paragraph 7 of Leslie V. Moore's affidavit in support of defendant's motion to dismiss, stating that Mr. Leach asked, "Has a charging decision been made?," and that I answered simply "No," is not accurate, nor does it accord with the purpose, nature, and context of the discussion.

12. At all times during the October 4 meeting, I acted in good faith upon my instructions to pursue a preliminary, lawyer-to-lawyer discussion concerning a possible cooperation agreement with Mr. Scrushy without violating the Court's sealing order. At no time did I attempt to convey any false statement during the October 4 meeting or at any other time, to defense counsel or any other person involved in the investigation, nor have I ever attempted to deprive Mr. Scrushy of any right or advantage by such means.

13. In specific response to the assertion of defense counsel Leslie V. Moore in his affidavit accompanying defendant Scrushy's motion to dismiss the indictment, Doc. No. 132, Exh. A ¶ 6, I did not state, nor did any other government counsel state, during the October 4 meeting or at any time that I am aware, that Mr. Scrushy would be indicted if he did not testify as the government wanted him to testify. When defense counsel accused the government of taking this position, I specifically and pointedly rejected that mischaracterization of our position, and I expressly stated that, as in every potential cooperator's case, Mr. Scrushy would be required by any cooperation agreement to testify fully and truthfully.

14. I do not recall counsel for Mr. Scrushy making a specific request at the October 4 meeting or at any later time that Mr. Scrushy be permitted to testify

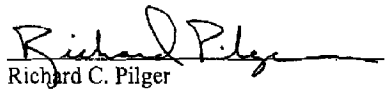
before the grand jury. I do recall that the government suggested at the October 4 meeting the possibility of grand jury testimony if there was a cooperation agreement, which was never forthcoming.

15. One or two days after the October 4 meeting, I received a telephone call from defense counsel Leach, who advised me he would be meeting with Mr. Scrushy. Mr. Leach asked me to provide him with legal points and authorities supporting the government's theory of Mr. Scrushy's liability. Apart from referring Mr. Leach to a leading case relevant to the matter, I declined to further address the matter.

16. In all my dealings with defense counsel relating to this matter, I intended only to accurately inform defense counsel of our willingness to negotiate in good faith, and I had absolutely no purpose or expectation of inflicting any prejudice upon the defendant, nor am I aware of any way in which the defendant was in fact or in theory prejudiced in any manner whatsoever.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2006, at Washington, D.C.



Richard C. Pilger
Trial Attorney
Public Integrity Section
Criminal Division
United States Department of Justice
202-514-1178

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA

Vs. CR. NO. 05-119-F

DON EUGENE SIEGELMAN, RICHARD
M. SCRUSHY, PAUL MICHAEL HAMRICK
and GARY MACK ROBERTS
Defendants

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ORAL ARGUMENT
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Before Hon. Charles S. Coody, Magistrate Judge, at Montgomery, Alabama, Commencing on March 14, 2006

* * * * * * * *

APPEARANCES: For the Government: Louis V. Franklin, James B. Perrine, Stephen P. Feaga, Richard C. Pilger, Jennifer Garrett, Richard Friedman, Joseph L. Fitzpatrick, Jr., Assistant U.S. Attorneys

For the Defendant, Seigelman: Charles R. Pitt, David A. McDonald, Vincent F. Kilborn, III, Hiram Eastland, Joe C. Jordan Attorneys at Law

For the Defendant, Scrushy: Arthur W. Leach, Leslie V. Moore, Terry L. Butts, Frederick G. Helmsing, Sr., Attorneys at Law

For the Defendant, Hamrick: Michel Nicrosi, Attorney at Law

For the Defendant, Roberts: Stewart D. McKnight, III, Samuel J. Briskman, Attorneys at Law

INDEX OF WITNESSES

(The above case coming on for hearing at Montgomery, Alabama, March 14, 2006, before Honorable Charles S. Coody, Judge, the following proceedings were had commencing at 10:45 a.m.:)

THE COURT: Good morning. We are here in United States versus Scrushy for the purpose of a hearing on the Defendant's motion concerning prosecutorial misconduct. Gentlemen, I have read the briefs, I am familiar with them, and I think before I hear the argument I would like to hear the evidence. Does either side wish the rule? Very good.

MR. FEAGA: The United States does not, Your Honor. And I would like to ask the Court if I could introduce an attorney who is here with us, Richard Friedman, he is with the United States Department of Justice, appellate section, and with the Court's permission he will be doing the argument on the law for the United States to the extent that the Court wants to hear any. It would be my intention to examine the witnesses.

MR. HELMSING: Your Honor, Fred Helmsing for Mr. Scrushy. We don't ask for the rule either, and the way we will proceed I will examine the two witnesses and then I think Mr. Leach would address the legal arguments after I do that.

THE COURT: Very good. Call your first witness, Mr. Helmsing.

MR. HELMSING: Les.
THE CLERK: Do you solemnly swear or affirm that the testimony you give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God?
THE WITNESS: I do.
LESLIE V. MOORE, witness for the Defendant, having been duly sworn or affirmed, testified as follows:
DIRECT EXAMINATION
BY MR. HELMSING:
Q. Would you state your full name for the record, please.
A. Leslie V. Moore.
Q. And are you a lawyer?
A. Yes, sir.
Q. Who -- in connection with the matters we are here today, who were you representing?
A. I represent Richard Scrushy.
Q. All right. Now, in that capacity did you have an occasion to attend some meetings with representatives of the United States Attorney's office here in Montgomery?
A. Yes, sir. I attended one meeting.
Q. One meeting.
A. Yes, sir.
Q. And what was the date of that meeting?
A. October 4th of 2005.
Q. And can you tell the Judge what the purpose of the

meeting was as far as you know?
A. The purpose was for our team, Mr. Scrushy's legal team to discuss with the U.S. Attorney's office the case that they were investigating in an attempt to avoid an indictment of Mr. Scrushy.
Q. Now, did you know of any indictment at the time you went into the meeting?
A. No, sir.
Q. All right. Now, can you -- who was present on the Scrushy side of the team?
A. Art Leach, Lewis Gillis and Chris Whitehead.
Q. And who was present for the government as best you recall?
A. Mr. Louis Franklin, Richard Pilger, Mr. Fitzpatrick from the AG's office and Mr. Perrine. I think that's how you pronounce it.
Q. Now, where was that meeting held?
A. In the U.S. Attorney's office here in Montgomery.
Q. That is in this building?
A. No, sir, it's in a building around the corner.
Q. Okay. Now, can you tell the Court what occurred at the meeting?
A. When we initially got to the meeting it was discussed that the government was interested in the cooperation of Mr. Scrushy and we were willing to proffer -- make a proffer on

that. And they were willing to offer a pass or a nonprosecution agreement. And after that short discussion they began -- Mr. Pilger began explaining the case or what they believed to be their case against Mr. Scrushy.

Q. All right. Now, was there -- in the course of this discussion was there any question about the status of the proceeding against Mr. Scrushy?

A. Yes, sir. After the government talked about -- Mr. Pilger discussed what they believed their case was against Mr. Scrushy Mr. Leach made the comment that Mr. Scrushy's memory of what went on during that time was vague and that if his memory -- if he didn't remember the same version that they had told us where did we stand at that point. And Mr. Pilger said he could be expected to be indicted.

Q. All right. Now, was there any discussion that you heard with regard to whether or not a charging decision had been made?

A. Yes, sir. After Mr. Pilger made that comment Mr. Leach says well, has a charging decision been made? And Mr. Pilger responded no.

Q. Was there any discussion of whether an indictment had already been rendered or returned by the grand jury?

A. No.

Q. What occurred after the statement of Mr. -- it was Mr. Pilger you said?

A. Pilger.
Q. I couldn't hear you.
A. Pilger.
Q. Pilger. After he said that no charging decision had been made, what then transpired after that?
A. Mr. Leach went through and explained what Mr. Scrushy's version or what his memory was of the events that they had previously discussed with us.
Q. And approximately how long did the meeting last?
A. 30 minutes, give or take. Probably a little more than 30 minutes.
Q. And you were not present at any other meetings?
A. No, sir.
Q. Did you have any telephone call or conversations with anybody at the U.S. Attorney's with regard to this matter?
A. Yes, sir. Sometime after that meeting, and I do not recall the exact date, myself and Mr. Leach on a conference call called Louis Franklin and he was on the road if I am not mistaken traveling and we let him know we were still interested in cooperating and I believe he asked if we had any new information to provide and we said not at that time. And I think it was ended that one of us would be back in contact with the other.
Q. During that conversation was there any question about the status of the proceeding, that is, whether an indictment

had been returned or not --
A. No, sir.
Q. -- against Mr. Scrushy?
A. No, sir.
MR. HELMSING: Could I have just one minute, Judge?
THE COURT: Yes.
(pause)
Q. Do you recall a telephone call the day before the indictment was returned?
A. Yes, sir.
Q. And can you tell --
THE COURT: Which indictment? Are you talking about the one -- the first one?
Q. Excuse me, the indictment against Mr. Scrushy.
A. October 26th I believe is the date. The phone call was on October 25th.
Q. Okay.
A. Mr. Leach and I were at the office in his work area and he made a call where I could hear the call to Mr. Franklin. And some of the other members of the U.S. Attorney's office were in the room and Mr. Leach specifically asked Mr. Franklin had a charging decision been made and Mr. Franklin said no.
Q. And that was on October the 25th of 2005?
A. Yes, sir.

Q. What was the date of the indictment that was returned against Mr. Scrushy?
A. I believe it was the next day, October 26th.
Q. October 25th?
A. 26th.
Q. 26th. All right.
MR. HELMSING: That's all we have of this witness, Judge.
THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. FEAGA:
Q. Mr. Moore, how long have you been practicing law?
A. Three years, approximately.
Q. And where are you admitted to the bar?
A. In Alabama.
Q. What were you doing for a living before you became an attorney?
A. I worked at HealthSouth for a period of time and I was in law enforcement prior to that for over 19 years.
Q. When did you work at HealthSouth, what period of time?
A. 2001 until 2003.
Q. Okay. And what were your duties and responsibilities when you worked at HealthSouth during that time frame?
A. I was assistant director of corporate security.
Q. And who did you report to?

A. Jim Goodrow.
Q. Okay. Did you have occasion to have frequent contact during that time frame with Richard Scrushy as part of corporate security?
A. I really wouldn't say it was frequent contact. I kind of ran the operations at the office and I would talk to him and see him coming in and out and I would say occasionally, not frequently.
Q. Now, prior to 2001 when you went to work for Mr. Scrushy at HealthSouth what did you do for a living?
A. I was in law enforcement.
Q. And how long were you in law enforcement?
A. Over 19 years.
Q. Okay. And what did you do in law enforcement?
A. I was a -- well, for the first six years I worked for Montgomery PD, the first two in patrol, the second two as a narcotics detective, and the last two as a robbery/homicide detective. And then for the -- after that through the 19 years I was a narcotics investigator for the state, primarily assigned to federal task forces.
Q. Did you ever have occasion pursuant to your duties and responsibilities as a narcotics investigator or agent to have contact with an individual named Louis Franklin?
A. Yes, sir, numerous times.
Q. Okay. And what was the reason that you would have

contact with Mr. Franklin?
A. I made drug cases and brought them to the U.S. Attorney's office for prosecution and he prosecuted them.
Q. During the time that you -- would you say that you had frequent occasions then to work with Mr. Franklin?
A. Yes, sir.
Q. Do you know of any other prosecutor during your 19 years that you worked with more than you worked with Mr. Franklin?
A. No.
Q. During the time that you worked with Mr. Franklin was there ever an occasion when he asked you to do anything that you considered to be improper or deceitful in any way?
A. No, sir.
Q. Now, you testified on direct that on October the 4th, 2005 I believe, that was the first meeting that you and Mr. Leach and Mr. Gillis and Mr. Whitehead had with any representative of the United States; is that correct?
A. First meeting I ever had.
Q. Correct. There was though and you are aware of it as counsel for Mr. Scrushy another meeting that took place long before that one, was there not?
A. That's correct.
Q. And as his counsel you are aware that Mr. Franklin and I came up in July of 2004, almost a year before he was indicted in the sealed indictment, and discussed this matter with

representatives of Mr. Scrushy; is that right?
A. I know that the meeting occurred, I don't know when it was. And I know that you discussed matters with them.
Q. Isn't it true that you know based on your conversations with co-counsel that in the July, 2004 meeting Mr. Franklin and I made known to your co-counsel the nature of the charges and information that we had discovered during the course of our investigation regarding Mr. Scrushy; is that right?
A. I know there was some information provided but I wasn't there so I don't know how much.
Q. Okay. Well, based on your conversations with co-counsel wouldn't you say it's true that we told counsel during that conversation that we believed that two two hundred 50 thousand dollar payments had been made as part of a five hundred thousand dollar bribery agreement between Mr. Scrushy and Mr. Siegelman, wouldn't it be fair to say that we told you about that back in July of 2004?
A. From what I understand that was communicated at the meeting.
Q. Yes, sir. And isn't it also fair that your understanding of the events is that we also discussed the fact that the government had a concern about these matters in regards to whether or not the statute of limitations might run at or near the time of the second payment, that being May the 23rd of 2005?

A. I am familiar with that.
Q. Okay. Now, during the course of our conversations with Mr. Scrushy in the first meeting that we had with his counsel, is it not true that we at that time having explained to them what our investigation had discovered at that time inquired as to whether or not Mr. Scrushy would be interested in entering into any type of cooperation agreement and testifying for the government?
A. I don't know the answer to that. That was not relayed to me.
Q. Okay. Well, did any of your co-counsel tell you that information was communicated during that first meeting?
A. I was not involved in that first meeting and I didn't have a whole lot of communication with them about that first meeting because I was more focused on what was going on in Birmingham at the time.
Q. For instance, Mr. Leach, did he tell you that that information was communicated during the July, 2004 meeting?
A. I don't remember him telling me that.
Q. Okay. Did Mr. Leach tell you or did you find out from any of your other counsel that they -- at that time your co-counsel declined to engage in further discussions, negotiations with the government and elected not to take the government up on its offer to have Mr. Scrushy come in and testify truthfully about what he knew about these matters?

A. No, that was not relayed to me.
Q. Do you think it would have been important for you to know that that offer had already been extended when you and co-counsel approached the government again in October of 2005, approximately 15 months later to find out from the government what was going on with the case?
A. Would you repeat that again?
Q. My question is this, since it had already been explained to your co-counsel -- if, in fact, it had already been explained to your co-counsel what the government believed the facts to be, why did you make an approach on October the 4th in 2005 unless it was to make some proffer consistent with or related to the information that had already been exchanged with you?
A. I don't know how it was related to the first meeting or the first exchange, I just know that we went to this meeting. This meeting in Montgomery was set up if I'm not mistaken by Lewis Gillis who was involved in the first meeting.
Q. So it's your understanding that it was counsel for the Defendant that initiated the contact.
A. I think it was.
Q. And Mr. Gillis was part of the meeting that I asked you about that took place in July of 2004; is that right?
A. You say he was -- what was your question again?
Q. Was he not a part of -- you said you did not attend the

meeting that we had with your co-counsel in July of 2004.
A. Right.
Q. But Mr. Gillis, Lewis Gillis did.
A. I believe he was there. I wasn't there so I can't say who was there, but I believe he was there.
Q. My question is that in a motion filed with this Court you are aware that your co-counsel has accused the government of having some nefarious motive for meeting with you in October of 2005; is that right?
A. Right.
Q. Okay. And I believe you allege in the motion that we met with you with the express idea in mind of deceiving you about whether or not you had been indicted.
A. I think we were deceived about whether or not we were indicted.
Q. Okay. Well, let me inquire into that. You said the question was asked has a charging decision been made; is that right?
A. That's correct.
Q. You have seen the sealed indictment that's in question in this proceeding; is that right?
A. That's correct.
Q. And you have seen the indictment that was returned on October the 26th -- excuse me, 27th, of 2005; correct?
A. That's correct.

Q. And isn't it true that it contains charges against your client that were not contained in the original indictment?
A. There's no new information but there are new charges.
Q. Okay. But it -- okay. But it contains new charges; correct?
A. I believe it does, I would have to look at it.
Q. It also contains new charges against other Defendants, does it not?
A. Yes.
Q. In other words the sealed indictment had the same charges against Mr. Siegelman as it did against your client; correct?
A. Correct.
Q. The new indictment has a multitude of additional charges against Mr. Siegelman, does it not?
A. That's correct.
Q. It also adds two new Defendants, does it not?
A. That's correct.
Q. And it adds a charge against your client; correct?
A. I believe it does.
Q. So, the reason I asked you the question earlier, Mr. Moore, about your prior dealings with Mr. Franklin, you said you had never dealt with any other prosecutor more than you did with Mr. Franklin, you said during that entire time he never asked you do anything underhanded or deceitful; is that

correct?
A. That's correct.
Q. Would you not say to this Court that Mr. Franklin was one of the most honorable attorneys you ever dealt with?
A. I would say that he is.
Q. Then is it not true that when Mr. Franklin responded to your question about whether or not a charging decision had been made that there had not been one made, that in the context of the discussions that were taking place what he was referring to was that a final decision had not been reached and the government was negotiating with you on the basis at that time that you had come back to see them having already met with them 15 months earlier and now might be willing to proffer some additional information?
A. Would you repeat that question?
Q. Yes, be happy to. I asked you earlier had you had dealings with Mr. Franklin and you said you had.
A. That's correct.
Q. Significant and extensive dealings with him.
A. That's correct.
Q. And I am asking you if it is not just as likely that when he answered your question that you say Mr. Leach posed which was has a charging decision been made and he said no, that taking into context the entire conversation that you had with them that what Mr. Franklin was communicating to the

defense was that we have not made a final decision about whether your client will or will not be in a final charging instrument and we are here in good faith negotiating with you over whether or not he wants to become a witness in this case, is it not possible that that's what he meant and that he wasn't trying to deceive you at all?
A. What we received was has a charging decision been made, no. There was no has there been a final charging decision made, that wasn't the question.
Q. That's not what I am asking you. You have told everybody in this courtroom and the Court that you know this man.
A. I do.
Q. He is one of the most honorable men you have ever dealt with.
A. I agree.
Q. And you sat in on that meeting, and I am asking you to tell the Court whether or not you believe Mr. Franklin was intentionally trying to deceive you or whether he was trying to give you an honest answer to your question considering the context in which that entire conversation took place?
A. The communication with Mr. Franklin was over the phone on the 25th of October, the communication at the meeting was with Mr. Pilger. Mr. Pilger is the one that Mr. Leach asked the question has a charging decision been made. He's the one that answered no to Mr. Leach. So there's two different

situations.
Q. Mr. Franklin was present then at the October 4th meeting; is that correct?
A. That's correct.
Q. So he was sitting there listening to this conversation.
A. That's correct.
Q. Did you hear him correct Mr. Pilger?
A. No.
Q. Did any of the other government lawyers present correct Mr. Pilger?
A. No.
Q. Is it not possible knowing what you know about Mr. Franklin and having had the dealings that you have had with him, and you were there, you heard this entire conversation, are you telling the Court you believe the United States entered into that meeting with the expressed purpose of deceiving you in some way to prejudice your client or do you think Mr. Franklin was there in good faith trying to negotiate a resolution with your client?
A. I think he was trying to negotiate a resolution, but we left that meeting believing -- we came into that meeting and left that meeting believing there was no indictment.
Q. At the time you came into that meeting you now know you had, in fact, been indicted; right?
A. That's correct.

Q. How did meeting with the government that day and leaving with the understanding that you had not been indicted prejudice your client's case?
A. Well, by the information we provided them during the meeting about what our defense would be, and what our strategy would be in the trial --
Q. Well, you knew --
A. -- in defending against the charges.
Q. That's why I asked the earlier questions about what your co-counsel had been told 15 months earlier. And then I believe you prefaced your earlier testimony with a statement that the government outlined its case again; correct?
A. Right.
Q. When you came to the meeting.
A. That's correct.
Q. Now, being aware -- you said you had been practicing for at this time what, two years?
A. Yeah, about, three.
Q. And Mr. Leach, how long had he been practicing?
A. A bunch, 25 years.
Q. What about Mr. Lewis Gillis?
A. A long time.
Q. When you came to that meeting you knew the government's theory of the case at least through Mr. Gillis; correct?
A. Right.

Q. Okay. And you knew it again based on what the government told you; correct?
A. They were wanting us to confirm meetings and things that occurred and they didn't have everything they needed.
Q. Okay. But you -- now, let's go back to your experience as an agent. Did you ever have opportunities when you were an agent to meeting meet with Defendants that -- as part of plea discussions and plea negotiations?
A. Many times.
Q. Did you come to those meetings was a fairly set preconceived notion of what the evidence was and what the facts were based on your investigation?
A. Yes.
Q. And when you came to those meetings were you expecting the Defendant if he was really interested in negotiating an agreement with you to provide you some information that would be consistent with that evidence and those theories that you had?
A. Yes.
Q. And if he, in fact, did not do so did you very often conclude agreements with him? In other words, if the Defendant didn't tell you anything that was consistent with the evidence that you had discovered and consistent with your theories of the case that you had laid out to him, did you then go out and negotiate a deal with him anyway?

A. Usually not.
Q. Well, isn't it true that you and Mr. Leach came to that meeting and having now for a second time had the government's theories explained to you, offered nothing that would be consistent with those theories that would make your client useful to the government as a witness who we could conclude was telling -- willing to tell the truth if put under oath?
A. I think we did offer some things that were consistent with the theories.
Q. Wasn't it made clear to you that the government believed that it had evidence that established that your client, Mr. Scrushy, had paid five hundred thousand dollars to Don Siegelman in exchange for an appointment on the CON Board, didn't you know that to be the thrust of the government's case?
A. Yes.
Q. And when you came to that meeting did you, having heard it again from the government, say to anyone Mr. Scrushy would be willing to admit that he bribed Don Siegelman?
A. No, we didn't say that he would be willing to admit.
Q. So, in fact, you denied that he had done it, right?
A. We denied to go along with the government's version of what they wanted us to say.
Q. And again, you had Mr. Gillis in there, Mr. Leach in there, that's something else that you have left in these

proceedings, that somehow or another Mr. Scrushy was threatened through these high-powered counsel, right?
A. Right.
Q. Did you feel threatened sitting there in that room talking to Mr. Franklin and Mr. Pilger and Mr. Perrine and Mr. Fitzpatrick?
A. Me personally?
Q. Yeah. And if so how? How is it different from hundreds of conversations you have had with Defendants over the years when you were trying to negotiate with them in plea discussions?
A. By the comment that if we didn't go along -- if Mr. Scrushy's memory didn't go along with the version that they talked about, that where would we be at that point, you could be expected to be indicted.
Q. Okay. And you went to law school; correct?
A. Right.
Q. And I don't mean to in any way an insult your intelligence, I assume you are an intelligent guy, you know as a criminal lawyer that the proper place to resolve disputes of fact is in a courtroom with a judge or with a jury, right?
A. I would assume so.
Q. And you and Mr. Leach and Mr. Gillis all knew that sitting there in that room, right?

A. That's correct.
Q. Well, having heard what the government believed and having now told us that you didn't agree with the government's theory of the case, what I am asking you is how were you prejudiced as a result of that meeting? You were already indicted, you know that now. How were you prejudiced?
A. Based on the information provided, and there were additional witnesses that testified in front of the grand jury after that meeting but prior to the last indictment.
Q. Okay. And do you -- are you familiar with what witnesses testified after that meeting?
A. I am familiar that Loree Skelton testified, yes, sir. And I am familiar with some of the other ones but her specifically.
Q. And, in fact, months ago the government provided you and Mr. Leach and Mr. Gillis at the time he was still in the case with all this grand jury testimony, didn't they?
A. That's correct.
Q. So you know exactly who testified and when they testified, do you not?
A. That's correct.
Q. Then let me just ask you, isn't it true that after the meeting with you and Mr. Leach and Mr. Gillis on October the 4th, the government called a grand total of four witnesses to the grand jury?

A. I have not looked to verify. Loree Skelton is the one I know for sure that testified on December 7th.
Q. Let me suggest to you that the record would reflect that because I want to ask you some questions and I will ask you just to assume that it's correct that we did. Have you familiarized yourself with the testimony of someone named Derrell Fancher?
A. No.
Q. Okay. Well, if I represented to you that Mr. Fancher was an individual who as part of his occupation, I believe was a lawyer, but as someone that HealthSouth had used on occasion to write applications to the Certificate of Need Review Board would you dispute that?
A. No, I can't.
Q. Well, if he was called to the grand jury and that's what he was asked to testify about, what would that have to do with what you or any of your co-counsel told the government in any meeting you had with Mr. Franklin, Mr. Pilger, Mr. Fitzpatrick and Mr. Perrine?
A. I think it would have had something to do with the CON Board and applications that went to the CON Board, and the accusations are that Mr. Scrushy paid to have a seat on the CON Board, it would be connected. I haven't read the testimony so I don't know.
Q. Well, have you read the testimony of witnesses that were

called prior to that date who also served on the CON Board on September the 28th, six days before the meeting, Carol Giardina, Melissa Galvin Mauser, Roosevelt McCorvey, Borden Ray, have you examined that grand jury testimony?
A. I have not looked at every piece of grand jury testimony we have got, no, sir.
Q. But you are coming in here telling this Court that Mr. Franklin and Mr. Pilger deliberately deceived you and your co-counsel about this in order to gain this information and you have just testified that testimony was put on after that fact that related to, and I asked you specifically about Derrell Fancher and you said it related to the CON Board activities. If the United States called witnesses -- a series of witnesses before they ever met with you to discuss these same issues then that would kind of not be a very good argument, wouldn't it? When we called Carol Giardina and Melissa Galvin Mauser, Roosevelt McCorvey and Borden Ray to the stand on September 28th, 2005 that was before we met with you, right?
A. Right.
Q. So we certainly didn't have the benefit of any information from you or your co-counsel at that point in time that came post any sealed indictment, right?
A. I agree.
Q. All right. Now, you mentioned Loree Skelton.

A. Yes, sir.
Q. Have you examined the grand jury testimony of Loree Skelton?
A. Yes, sir, I have.
Q. What is it about Loree Skelton's grand jury testimony that you believe evidences any prejudice to your client?
A. I believe that she -- well, she changed her testimony from her original testimony in 2004 and her testimony in 2005 after our meeting when she was testifying about her relationship and her hiring of Tim Adams to put together a CON application on a PET Scanner.
Q. Okay.
A. In her original testimony she testified that Mr. Scrushy didn't know anything about that until after the fact. But in her 2005 grand jury testimony she testified that he was aware of it and she was doing it at his direction.
Q. Okay. And what information did you provide to the government on October the 4th that led to the production of that information?
A. I don't know what information was provided that led to that.
MR. FEAGA: If I can have just a moment, Your Honor.
Q. One other thing. In the pleading that you and co-counsel filed with the Court alleging impropriety on the part of the government you have alleged that we had a duty to file an

additional pleading with the Court after we filed the motion to seal the original indictment, are you familiar with that?
A. I am familiar with that being in the motion, yes, sir.
Q. And it is a part of your motion that, and your argument that the United States deliberately misled the Magistrate Judge by not coming back in and filing an additional pleading.
A. Our argument was that they had a duty once the -- once the reason that they had sealed the indictment had gone away that they should have gone to the Judge and got it -- at least a limited unsealing to where they could discuss it with us.
Q. Okay. Without getting into the issue of whether we had such an obligation, is there any doubt in your mind that Judge Coody was like every other citizen in the State of Alabama who was alive and breathing probably became aware of the fact that Mr. Scrushy was acquitted up in Birmingham on the charges that were part of that motion to seal?
A. What is your question?
Q. My question is, why would the government want to come in and say to the Court in an additional pleading, guess what, Judge, he just got acquitted?
THE COURT: I will answer that for you, counsel, because what I know as a human being and what I know as a Judge operate in two different spheres, and I may know

something of personal knowledge but that's not judicial knowledge and I don't act on personal knowledge when I function as a Judge, so move on to something else.

MR. FEAGA: Yes, sir, Your Honor. My questions to him are related to the allegation --

THE COURT: I understand what the allegation is, I have told you I have read the briefs, I am just telling you that your line of questioning on that point is -- gets you nowhere.

MR. FEAGA: All right, sir.

Q. By the way, you are aware of the fact that the government met with you and your co-counsel on at least three occasions and talked with you on the phone on two more; is that right?

A. I know of two meetings and then the two phone calls.

Q. Okay. What two meetings are you familiar with?

A. I am referring to the meeting you told me about in Birmingham that I had a little bit of knowledge about.

Q. You were there at the time you just were not in the meeting, right?

A. I was in Birmingham but I wasn't in the meeting.

Q. I mean we saw you up there, didn't we?

A. Right. And then the meeting on October 4th. And then the phone call to Mr. Franklin when he was on the road, and then the phone call right before the indictment, so that's two

phone calls and two meetings.
Q. Okay. And there was another meeting between Mr. Franklin and Mr. Lewis Gillis, was there not?
A. I believe there was, but I am not positive about that.
Q. But my question is this, is it not true that after the meeting that the government instigated prior to the return of any indictment in this case all four of the additional meetings were instigated by you or your co-counsel; is that right?
A. I believe that's correct.
Q. The government didn't seek to reach out to you to ask anything, you guys initiated contact on every occasion.
A. After the initial occasion, I believe you are correct.
Q. Okay. Now, you submitted an affidavit along with the pleading that was filed by you and your co-counsel on behalf of Mr. Scrushy; is that right?
A. Yes, sir.
Q. Okay. Contained in the affidavit you state at paragraph ten, and I will just read it to you and ask you if you stand by it. At this same meeting Mr. Leach also asked the government to call Mr. Scrushy as a witness before the grand jury and, quote, compel his testimony, end quote. Is that right?
A. That did occur.
Q. Okay. Now, in the body of the pleading that was filed by

you and co-counsel, in a -- okay. Isn't it true that in the body of the pleading filed by your co-counsel he characterizes that discussion about the government can compel its grand jury as Mr. Scrushy -- we offered or asked for Mr. Scrushy to have an opportunity to appear before the grand jury and tell his side of the story. That's not, in fact, what happened, right? The discussion revolved around the government can compel him to come; correct?

A. I think the discussion was both, that he could be compelled. I remember it as you can put him in front of the grand jury, you can compel him to testify, let him tell his side of the story, and if he lies you can charge him with perjury, that's what I remember the communication.

Q. But you don't remember any statement Mr. Scrushy would like to voluntarily appear before the grand jury and tell his side of the story to the grand jury.

A. I don't remember that.

Q. Okay.

MR. FEAGA: That's all we have for this witness, Your Honor.

MR. HELMSING: Just two follow-up questions, I think, Judge.

REDIRECT EXAMINATION

BY MR. HELMSING:

Q. You were not present at the meeting, the first meeting

that Mr. Feaga asked you about in Birmingham between him and Abbe Lowell and whoever else was there.
A. That's correct.
Q. You didn't hear any of the words or phrases of what anybody said or anything of that nature, did you?
A. That's correct.
Q. Now, Mr. Moore, when you went to this meeting on October the 4th, 2005, and when you left that meeting, did you or any of the counsel for Mr. Scrushy know about the indictment that had already been returned?
A. No.
Q. Did they tell you about that at that time when you went in there?
A. No, sir.
MR. HELMSING: That's all I have.
THE COURT: Anything else for the government?
MR. FEAGA: No, Your Honor.
THE COURT: Thank you, Mr. Moore.
THE WITNESS: Thank you.
THE COURT: Gentlemen, let me interject. At some point I need to know more precisely what Mr. Leach disclosed at that meeting, and given the nature of it as I understand it it would probably be necessary for the Court to hear that in private outside the presence of any people other than the lawyers involved.

MR. HELMSING: It would be with the next witness but I think in getting into that matter it should be in private.

THE COURT: Call your next witness, go through whatever you want to go through, when we get to that point I will excuse everyone from the courtroom.

MR. HELMSING: Mr. Arthur Leach.

THE CLERK: Do you solemnly swear or affirm that the testimony you give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

ARTHUR W. LEACH, witness for the Defendant, having been duly sworn or affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. HELMSING:

Q. State your full name for the record, please.

A. Arthur W. Leach.

Q. Can you give the Court in narrative form your background since graduating from law school. You are a lawyer, are you not?

A. I am.

Q. Since graduating from law school.

A. Graduated from law school in 1981, and I became an Assistant District Attorney in Georgia where I remained for two and a half years. At the end of my term as an Assistant District Attorney I became an Assistant United States

Attorney in Savannah, Georgia which is the Southern District of Georgia. I remained as an Assistant United States Attorney for ten years in Savannah. One of those years was on detail to Washington, D.C. where I was assistant director for policy and operations for the executive office for asset forfeiture which at that time was the national office for asset forfeiture for the Department of Justice. I came out of that detail and I went to Atlanta as an Assistant United States Attorney, and I remained there for nine years. At the end of my term I was chief of the Organized Crime Strike Force there in Atlanta. This is in late 2002, I went into private practice. In the last day of October or first day of November, 2003 Mr. Scrushy hired me and I have worked on his defense in other cases as a sole practitioner.

Q. Since you have been in private practice you have worked with his case and other cases as well?

A. Yes, and I was with the firm for about 18 months, Boone and Stone, which is in Buckhead, which is in Atlanta, Georgia.

Q. Now, in an effort to shortcut things, you have heard the testimony about a meeting that occurred in Birmingham between representatives of the government and I believe some lawyers representing Mr. Scrushy. Were you present at that meeting?

A. The meeting took place in Lewis Gillis' office. We, and by that I mean Les Moore and myself were physically present

in the office that evening, thought that we were going to attend the meeting, but we were told shortly before the meeting began that we were not going to attend the meeting. So we were on the outside of the meeting and my recollection is that we stayed for a period of time. I remember seeing some of the prosecutors in the case and shaking their hands but I am not sure if it was at the beginning of the meeting or the tail end of the meeting but I do remember seeing them there. But I did not participate in the meeting.

Q. And so you were there in the office but you did not participate in the meeting?

A. Right. We were not in the room at the time that that meeting took place.

Q. And did you hear what was said and who said it during that meeting?

A. Not really. My recollection is that I got a scant debrief of what was occurring but not in any great detail. The way that it was working within our defense team at that time is there were certain people that were responsible for that, primarily Abby Lowell. I had other responsibilities, and it was more, you know, just over a lunch table or something like that that I would hear something. But I don't feel like I ever got, you know, the full flavor of what occurred in that meeting.

Q. So what you know about what occurred in that meeting you

heard from some member of the Scrushy legal team after the meeting; is that correct?
A. Right. And I have also talked to the government and, you know, in my conversations with the government they have also told me what occurred in that meeting. So my recollection is mixed between sources from the government and sources on the defense side.
Q. But you didn't actually hear what went on.
A. That's correct.
Q. All right. Now, do you recall a meeting that was held here in Montgomery on October the 4th, 2005?
A. Yes, sir. I remember that meeting.
Q. And I think we have already identified the people that -- Les Moore did that were present, do you agree with that?
A. Yes, that's accurate.
Q. Can you tell the Judge what you recall occurring in that meeting. Well, strike that. What was the purpose of the meeting first of all?
A. Well, the purpose from our perspective was to avoid indictment. It was our belief at that time that an indictment had not occurred. There were issues with regard to the statute of limitations and I was confused about that. In other words I didn't quite understand why it was that we were, you know, again considering an indictment at this time,

and that is in part why I asked about whether a charging decision had been made. I also asked very --

THE COURT: Let me ask you a question about that because I am very curious about that. At some point before that meeting you had entered into on behalf of Mr. Scrushy --

THE WITNESS: Mr. Lowell.

THE COURT: -- Mr. Lowell, a tolling agreement that ran for 30 days; is that correct?

THE WITNESS: That is correct.

THE COURT: What was your understanding about why that agreement was necessary?

THE WITNESS: The way that I understood things were occurring at that time is that there were discussions going on with public integrity in D.C., and I believe I recall that there was actually a meeting that took place at public integrity, Mr. Lowell's office is in D.C., and it was my impression coming out of that meeting with public integrity that there were going to be no charges against Richard Scrushy. So I was confused in that I didn't quite understand why this issue was resurfacing. So that's really where I was. And I asked during the course of this meeting on October 4th how they were dealing with the statute of limitations issue. And the answer from Mr. Franklin was they did not have a statute of limitations problem.

THE COURT: Why didn't that put you to the belief

that an indictment had been returned? I mean, based on your history, you are not a new kid on the block like Mr. Moore and you are certainly sophisticated about these matters.

THE WITNESS: Yes, sir.

THE COURT: There had been a tolling agreement which I assume would not have been entered into but for it being necessary.

THE WITNESS: Yes, sir.

THE COURT: And it expired without you knowing anything had happened.

THE WITNESS: Right. A long time ago.

THE COURT: And it did. And that would have begun to clue me in that something had happened, because otherwise why would you have had a meeting in October about charges which at that point could not be made if the statute had expired?

THE WITNESS: Right. Because what I was concerned about, Judge, is that there was some way that they could pull Richard Scrushy on an overt act of the conspiracy. In other words that perhaps those charges from a substantive standpoint were gone, which is kind of where my impression was, and that there might be some consideration of doing something with him in terms of either a conspiracy charge where there was an overt act or a RICO charge where there was a predicate act of the RICO or a RICO conspiracy where an overt act was within the five years.

And frankly the purpose for the meeting was to try to gain some level of confirmation and comfort that it was not the United States government's intent to go after Mr. Scrushy and to try to figure out whether or not it was their desire to utilize Mr. Scrushy as a witness and to see if we couldn't come to some sort of understanding where Richard Scrushy wouldn't be charged and we could proffer the information and get together so that they would understand where we are coming from and they -- you know, we could have both sides kind of coming together in the middle on this stuff. And, you know, I came away from the meeting distressed, Judge. I mean I was alerted that there was a problem but it was more of a factual problem as opposed to the fact that there was an indictment pending. I never came out of that meeting with any sort of feeling that there was an indictment hanging over Richard Scrushy's head.

THE COURT: Well, my fundamental question about that whole event is given what you knew and given the discomfort that you have now described, why would you have said anything that would have disadvantaged your client?

THE WITNESS: Well, I took it up with my client, I told him that the best thing that we could do in the event that there was any consideration to including him in any sort of conspiracy charge is to see if he could come to an understanding with the government. Now, the understanding

that I wanted is that Richard Scrushy would just stay on the sidelines and not get in the fight.

MR. HELMSING: I think before we get into the substantive discussions --

THE COURT: We won't get into that.

THE WITNESS: And I won't go there either.

THE COURT: I don't think we will do that.

MR. HELMSING: But that should be in private.

THE WITNESS: Okay. My concern was that the government was worried that Richard Scrushy was going to jump in and support the governor in the situation, and what I wanted to convey to the government is the fact that Richard Scrushy had no interest in doing any such thing and that Richard Scrushy would remain on the sidelines, and I wanted the government to understand what those facts would be. And if it was valuable to the government, that's fine. If it was the sort of situation where they just prefer that we get on the sidelines and stay out of the fight, that's fine. I just wanted my client in a situation where he wasn't under indictment. That's what I was seeking from that meeting.

THE COURT: Go ahead, Mr. Helmsing.

Q. Now, at that meeting did you have occasion to address this issue of whether or not a decision had been made to charge Richard Scrushy of any crimes?

A. Yes, sir, I did.

Q. And can you tell the Judge what occurred and what you said and what they said in that regard.
A. It was back and forth between the government. It was Mr. Pilger and we were discussing what was going on in the case. And it was all in the same line having to do with the statute of limitations issue and the facts as they expected Mr. Scrushy to present them. And I just felt it would be prudent to ask at that point whether they had made a charging decision. Because if they had made up their mind that they were going to charge Richard Scrushy I didn't want to get in the position of providing them with a proffer. The idea was that if they had said to us yes, a charging decision has been made and he is going to be indicted, then there's no need to discuss it any further. And the words that Mr. Pilger was using at that point essentially to the effect if Mr. Scrushy can't say exactly this, then he has got a problem. And it was in that line that I said to him, you know, what will happen if he it doesn't totally correspond with what you are saying? And he said he can expect to be indicted. And I said to Mr. Pilger, do you want the truth or do you want your version? And, you know, frankly things got somewhat heated between me and Mr. Pilger, not only at that point but at the conclusion of the meeting.
Q. But can you address your remarks as to what was said about the charging, whether a charging decision?

A. I asked Mr. Pilger directly whether a charging decision with regard to Mr. Scrushy had been made and he told me no.
Q. Did he at any time, he or anybody else in that meeting on the side of the government, tell you that an indictment had already been returned in the Middle District of Alabama against Mr. Scrushy?
A. No, sir. And there was no discussion about, you know, any temporary decision or that they could reverse their decision, there was nothing along that line.
Q. Now, at the conclusion of that meeting or after that meeting did you have any further discussions with anybody in the government with regard to Mr. Scrushy?
A. Yes, sir. Part of what was discussed in great detail on the meeting of the 4th was an analysis of the law where we were trying to take the facts and plug them into the law, and Mr. Pilger repeatedly said to me he had case law that would show that if the facts were in a certain series that that would be sufficient. And I disputed that. I had looked at the law before I went to the meeting and I asked Mr. Pilger whether or not he would supply me with that law. He said he would. I didn't get it so I decided to call Mr. Pilger, and I called him I believe on his cell phone and got him on the phone and he provided me one case and I did pull that case and we looked at that case.
I also had conversations with Louis Franklin. The

one that Mr. Moore referred to was a conversation where Mr. Franklin was on the cell phone, he was traveling back I believe from South Carolina where the United States Department of Justice has their training facility. And in that conversation we also discussed, you know, whether there was anything else we could do and whether any decision had been made in terms of charging. He indicated no.

And then finally the last meeting was a meeting which was the day before the indictment which is the superseding indictment, Your Honor, the first superseding indictment that was on October the 25th. Of course, I didn't know that the next day an indictment was going to be handed down, but I called and I was placed on conference. I know Mr. Franklin was there, I believe Mr. Perrine was there and a man named Brennan. I made a note at that time when that meeting was taking place as to who was present on the government side. And we again had a brief discussion about the status of Mr. Scrushy and I asked whether a charging decision had been made and Mr. Franklin told me no.

Q. All right. That was a telephone call, right?

A. That was a telephone call.

Q. Not a face-to-face meeting.

A. That's correct, Your Honor -- yes, sir.

MR. HELMSING: Your Honor, to the extent that we want to get into, or you would like to get into the substance

of what they talked about, then we feel that ought to be done in private.

THE COURT: I agree, but before we get to that, let's let the government cross-examine Mr. Leach with regard to his testimony to this point. I will then close the courtroom.

MR. HELMSING: Yes, sir.

CROSS-EXAMINATION

BY MR. FEAGA:

Q. Mr. Leach, you said that you came to this October 4th meeting with Mr. Lewis Gillis; is that right?

A. Yes, sir.

Q. Now, Lewis Gillis was in the original meeting that the United States had with your co-counsel regarding the results of its investigation at that point in time; isn't that right?

A. Yes, sir.

Q. Okay. You are not telling this Court that he didn't brief you on what he had been told by the United States before you came down to this meeting, are you?

A. All right. I am confused. As to the first meeting?

Q. Yeah. I mean you came down on October the 4th with one of your co-counsel who had sat in on the government's first meeting. Are you telling me that you traveled to this meeting without having been briefed by him, what the government had told you and your -- I say you because as co-counsel is you,

but had told your co-counsel in July of 2004, you had had no briefing on that from him?
A. What I recall Mr. Gillis telling me is that he had had a more recent meeting like the day before or maybe two days before with Mr. Franklin and that the discussion was that we would try to get together. That's what I remember. In terms of what had happened previously, yes, he gave me some indication of what had occurred before, all of it fairly familiar to me in terms of the fact that, you know, what the government's overall theory was and so forth. But it was not in any great depth.
Q. That's what I am getting it. You came to that meeting on October 4th knowing what our theory of possible eventual case against your client would be, right?
A. I learned more about the government's theory of the case sitting there and listening to the government outline it than I had in my possession before I went in there. I learned with greater precision at the meeting. But I had some idea of what the government's theory was as to Richard Scrushy.
Q. And I am a little confused because I thought I heard you tell the Court that you were trying to avoid an indictment --
A. That's right.
Q. -- and you weren't sure whether or not you were going to be indicted, is that what you told the Court?
A. That's what I told the Court.

Q. But you allege in your pleading that Mr. Pilger not only told you you were going to be indicted but threatened you with an indictment.
A. Right.
Q. If you didn't, as you put it, tell the facts the way he wanted you to tell it; isn't that right?
A. Didn't occur exactly that way. The way that it occurred was I -- we discussed the facts from the government's perspective, I discussed the facts from our perspective and Mr. Pilger in essence -- this is paraphrasing -- said if your client is telling you that it's a lie. And I said well, do you want the truth from my client or do you want the construction of facts as you have put them together.
Q. And you I think characterized the discussions that took place after that as a heated discussion between you and Mr. Pilger.
A. That is the heated discussion.
Q. Is it true that the reason the conversation got heated is because Mr. Pilger took afront at the fact that you had accused him in essence of threatening your client with indictment if he didn't tell a particular version of the story as opposed to the truth?
A. It's heated at two places. That's one place where it's heated and it's heated at the very end. Where what happened at that point is that we resolved the fact that the

government wants the truth, which every prosecutor as an Assistant United States Attorney or Department of Justice lawyer is always seeking the truth. And once we cleared that, we got to the end of the meeting and once again I was told that if the construction of the facts are any different than what Mr. Pilger is outlining, it's a lie. And I got upset about it, yes, I did.

Q. Well, don't you -- you have said -- you have made much of the fact that you were an experienced government prosecutor, you had how many years as an employee of the United States government prosecuting cases?

A. 19 years with the Department of Justice, it's a total of 21 years as a prosecutor.

Q. Are you telling the Court by the testimony that you are providing that you never engaged in discussions with defense counsel where the version of the facts that their client wanted to provide was inconsistent with what you believed were so and they broke down on that basis?

A. Those discussions happen all the time. I never went and told counsel that their clients were telling a lie. I didn't do that. I took the proffer and then I took action based upon that proffer.

Q. Well you seem to be drawing some distinction on the notion of whether or not they used the word lie or we don't believe your client is telling the truth. Does it really make

any difference whether they said we think he's lying or we think he is not telling the truth?
A. It does to me, because this is what I am trying to do there, Mr. Feaga, I am trying to provide the government with the evidence that I think would assist the government and if the government doesn't want that evidence and simply wants me on the sidelines I am happy to do that. But what I'm trying to convey to the government is that Richard Scrushy is not guilty and he shouldn't be charged here. That's what I am trying to convey to the government.
Q. And you are saying that somehow what you were willing to say to the government -- why did it make a difference whether you had already been indicted or whether you were seeking to avoid an indictment in terms of your willingness to talk to the government?
A. Your question makes a big difference because whether or not I would provide a proffer once the issue has been joined is wholly different from the circumstances where I am being led to believe that the government is actually giving consideration to not charging my client at all.
Q. Let's get down to that. Didn't the government tell you that they were giving consideration in not charging your client at all?
A. That's right.
Q. And isn't it also something that they had the power to

do if they had -- if an agreement had been concluded with that your client that day or another day or any other day prior to the 26th of October to bring a superseding indictment and not have him in it at all?
A. And dismiss the earlier one.
Q. Exactly.
A. That's the key. There was the earlier one there and it would require a dismissal as opposed to the fact that I am sitting there thinking we are not presently charged.
Q. So why not ask has my client been indicted instead of saying has a charging decision been made?
A. That was what I was asking.
Q. But you didn't ask it, and so my question is why is it not just as likely that the government misconstrued your internal need for information because you used the word charging decision and they are talking to you about what is going to happen to your client prospectively. You know they can take him out of that indictment, and you know a superseding indictment was returned, why is it not just as likely that they were talking about a final charging decision and they were in good faith with you in there discussing the future of your client as it was they were trying to deceive you in some way?
A. Because words have meaning, Mr. Feaga, and an honest representation would be that there was no final decision

made. If they had told me that there was no final charging decision made here then I would have been in the position that the antenna would have immediately gone up and I would have responded with a question, well, has a preliminary charging decision been made? Do we need to parse this right down to the fine words in order to find out that there's a sealed indictment? Also as I say in the response, you know, the government could have gone back after that meeting. I have no problem with the fact that at that meeting they may have been confronted with the fact that I am pushing on the sealing order. But the government could have collectively gone back and made the decision to unseal that and then give me the information and then I would have reassessed. And I don't know, I may have talked with the government, I may not. Our communications could have continued.

Q. That's an important point. Isn't it true that whether the government had construed what you were asking them to be has an indictment been returned and then realized hey, before we answer that we have got to go back and get permission from the Court to discuss it with you, isn't it possible that they construed your question to be in the context of the conversations that were taking place, has a final decision been made about what to do with my client?

A. That's not possible, Mr. Feaga. Not possible.

Q. And you say that because you understood your question to

mean has an indictment been returned and you say it's not possible that they understood your question to be have you made a final decision that my client will have to be prosecuted as a matter of this investigation.
A. That's correct. I don't think that is even conceivable based on the conversation.
Q. So what you are saying is choice of words is very important.
A. That's correct.
Q. Let me ask you, and I did it inartfully but I think I have found the pleading. On page three of your original pleading at the bottom of the page you say thereafter Mr. Leach asked the government to let Mr. Scrushy testify before the grand jury and tell his story to the grand jurors. And you cite for that Mr. Moore's affidavit. Okay. And you referred to page three of his affidavit. But, in fact, what the affidavit says is very different, is it not, when you start talking about legal terms and intent, didn't you make a misstatement to the Court then under your theory when you said you asked for permission for him to come to the grand jury and tell his story, isn't that indicating to the Court that he wanted to voluntarily come?
A. The way that I put it to the government was why don't you put him in front of the grand jury. And all that would happen under that circumstance is if Richard Scrushy is not

telling the truth to the grand jury his exposure is increasing, not decreasing. That Richard Scrushy is willing to take on the responsibility of going in front of that grand jury and tell the truth and in the event he hasn't told the truth now you have got a perjury charge on top of everything else. The only thing that he would get is use and derivative use immunity, and that is to say that you just couldn't use his testimony against him but you could indict him with perjury, and that's how firm I was about the fact that he is telling the truth.

Q. But that's not what you said, and so what I am asking you to consider is that since you said you asked -- and there's a big difference between voluntarily coming to the grand jury to tell your story which is what you put in your pleading and your co-counsel's affidavit which says that what you in fact asked was for the government to compel his testimony.

A. That is what I asked.

Q. But that's not what you said in your pleading.

A. Show me. I have got it, just tell me where it is.

Q. Page three, the last sentence. You want to read it out loud?

A. Thereafter Mr. Leach asked the government to let Mr. Scrushy testify before the grand jury and tell his story to the grand jurors. It's the same thing.

Q. No, it isn't the same thing, at least that will be up to the Court to decide. But my point is this, you have a tendency at least demonstrated on the face of your pleadings to state things that may not be exactly the way you intend them.
A. I don't understand what you are saying, Mr. Feaga.
Q. I am asking you to go back then, read what you said and then if you would look at the affidavit that you attached to this.
A. You are going to have to give me the affidavit, I did not --
THE COURT: Well, did you suggest to them that they compel Mr. Scrushy?
THE WITNESS: Yes.
THE COURT: By subpoena?
THE WITNESS: No, the compulsion process, Your Honor, 6001.
THE COURT: All right.
THE WITNESS: Yeah.
THE COURT: And they said no.
THE WITNESS: They said that's not possible.
THE COURT: Very good. And after that you made this proffer that we are going to talk about in a few minutes.
THE WITNESS: No, this conversation occurs at the tail end of the proffer.

THE COURT: All right.
THE WITNESS: Yes.
Q. Isn't it true that whether you had been told -- if you had asked the question have you been indicted, and the government had said we have got to get back to you on that, okay, and they had come back two days later and said yes, you have been indicted --
A. Uh-huh. (positive response)
Q. -- you would have talked to them anyway, wouldn't you?
A. I don't know the answer to that. I would have had to consult with Mr. Scrushy and we would have had to assess the circumstances. I would have talked to you, Mr. Feaga, or Mr. Franklin, and I would have said what is your intent. And if you had come back to me and said our intent is to dismiss the indictment, I would have gone to Mr. Scrushy and said we are going to have to analyze this. I didn't get that opportunity. I didn't get a chance to analyze that.
Q. Isn't it true today that if your client were to tell you that you know what, the government's facts that they are going to lay out during this trial to attempt to prove that I bribed Don Siegelman, I have decided they are compelling, and you know what, I have decided to tell you the truth, Mr. Leach, I did buy the seat on the CON Board and I would like to testify to that, you would come and try to negotiate with the government tomorrow to try to resolve this case, wouldn't

you?
A. I can't answer that question because I don't believe that that is factually accurate.
Q. Isn't it true that --
A. Let me finish by saying I would work with the government 24 hours a day seven days a week to try to get Richard Scrushy's exposure resolved, the answer to that is absolutely yes.
Q. So the existence of the indictment or the nonexistence of the indictment isn't really the issue, the issue is you don't want to be prosecuted, the problem is your client will not tell a version of the truth that the government believes is consistent with the facts, right?
A. At that time you are talking about? At that time it was like banging heads and we separated.
Q. And isn't that what we do in here, we get a jury in the box and they decide whose version of the facts is right; correct?
A. That is correct, but the difference is that the government is not entitled to my information on providing me information that is incorrect.
Q. You didn't feel threatened in any way by any comments that the government was making to you, you are an experienced attorney, right?
A. I personally did not feel threatened. I felt threatened

for my client.
Q. But you have done the same thing hundreds of times yourself in conversations with defense attorneys, haven't you? Said your client is about to be indicted in my opinion based on these facts, why are you here?
A. I have taken proffers and I have rejected proffers, yes, you are correct about that.
Q. And isn't it true what happened in this instance is the government took a proffer from you and rejected it because it was still inconsistent with the facts that it had told you about 15 months earlier?
A. I don't know about the 15 months earlier, I didn't participate in that. I don't know about that aspect of it. But I can tell you this, there was a difference between the information that was provided to us and what we were providing to the government. The difference there, Mr. Feaga, is the fact that I believed that that was a gap that could be bridged. I believed that if the government would talk to Richard Scrushy that we could get past that because there were logical explanations for every part of what I was providing to the government.
Q. It is clear that the government has made known to you at every meeting that you have had with them that it categorically believes the evidence in this case establishes that your client knowingly and wilfully paid money to Don

Siegelman in exchange for a seat on the CON Board, right?
A. That's not true. It's not true only because we didn't need to discuss that information every single time we talked.
Q. But it's your understanding that the United States believes that to be so; correct?
A. It's my -- yes, the government has made that set of facts clear, just as I have made the other set of facts from our perspective clear.
Q. Right. And so the question, and I go back to it, is you would still be willing today to come in and discuss that if, in fact, the government -- your client were ever willing to say to you or did say to you some version of the facts consistent with what the government believes the evidence will, in fact, establish, right?
A. 24 hours a day, seven days a week, or if the government would listen to me and listen to our version of the facts and let us put it together in a way that that information would either have value to the government or would allow Richard Scrushy to be dismissed and put on the sidelines, yes, I would do that.
Q. Or if your client were ever willing to listen to the government's version of the facts as expressed to you, right?
THE COURT: Let me ask you a question.
A. And we tried to do that.
THE COURT: You have in various ways exalted the

truth. If Richard Scrushy knows the truth why does he want to sit on the sidelines?

THE WITNESS: Judge, only on the sidelines if that was the government's preference is what I am saying. In other words, if we provided that information to the government and the government said no thank you, but he is going to be dismissed from the indictment, we don't need him as a witness, I am totally satisfied with that.

THE COURT: That's not what I asked you. What I asked you essentially is why wouldn't he want to testify?

THE WITNESS: He would testify.

THE COURT: Well, that's not sitting on the sidelines.

THE WITNESS: What I am saying, Judge, it could be either way. On the sidelines or in the witness stand, either way.

THE COURT: Go ahead, Mr. Feaga.

MR. FEAGA: May I have just a moment, Your Honor?

Q. At any time during your discussions with Mr. Franklin, Mr. Pilger, Mr. Perrine or Mr. Fitzpatrick did either you or any of your co-counsel say to the government we will not meet with you if an indictment is pending in this case?

A. No.

Q. And at all times when you made statements to the United States about what, if any, theory you had regarding this

case, did you not always preface that with some statement that look, don't hold me to this, I can't say for sure, I have got to get back with my client, but what if? I mean wasn't that the way you presented the information to the government in these meetings you had with them? You never committed to anything, did you?
A. Well, the answer to that question is no, that's wrong. And here's why. There were certain parts of it that we could talk about, that I understood and I had a good solid proffer that I could present to the government. But the government was interested in some very specific aspects of this case. And those are the aspects that I could not speak further to. And I will tell you frankly the government couldn't speak to them either. There was a hole in the evidence, and the government wanted answers for those holes in the evidence. And there I was saying I need to go back, I need to look, I need to see if I can find additional information but it wasn't to be found. If you guys couldn't find it I couldn't find it, you know. It wasn't anything that I could do to fill those holes.
Q. And so that brings to light another point, and that is there wasn't any misunderstanding or miscommunication between you and the government about where the respective parties were on the facts, right?
A. Say that again, misunderstanding.

Q. There wasn't any misunderstanding on your part nor did you have any belief that the government misunderstood where you were on our respective positions on the facts, right?
A. Well, I personally believe there was great misunderstanding between the two of us. And personally I wish that you had been at that meeting, because I think that you could have helped fill in some of those holes and we could have investigated further and perhaps resolved this thing. And I say that because I have gotten to know you over time.
Q. And that brings me to this point, Mr. Leach. I recognize that we all make decisions about what is and is not good and correct lawyering in a case, but I am asking you is it not possible in your view, you attended these meetings, you have now spent some time in the presence of Mr. Franklin and Mr. Pilger and other counsel in this case, is it not possible that the government did not understand the question you were asking to require them to reveal an indictment but rather were responding to the idea that look, everything is still on the table, your client does not have to be finally charged in this case, is it not possible that that's the way the government construed those conversations?
A. The answer to the question is yes, it is possible. I heard all the questions that you asked Mr. Moore about Mr. Franklin. I have known Mr. Franklin for years -- known of him. I have a world of respect for him. But what you need to

understand is that's exactly why I felt like I could rely. I felt like, you know, I don't know these other lawyers, but I know his reputation. And I know it's a good reputation, nationally, as far as prosecutors are concerned. And I thought I could rely on that. Now, you know, was I mistaken, or perhaps they misperceived or a little bit of both, yes, I agree with that.

Q. Now, there's something else we need to -- I think that would probably be helpful to the Court because you have alleged in the motion that the government sealed the grand jury -- I think two arguments, let me make sure I have got them right. One that they sealed it for the purpose of strengthening the case that they had already made and they did that improperly, and that they also sealed it and used the fact that it was sealed to cause you and your co-counsel to be misled by the true status of his legal charges; is that right?

A. We have stated that it was a pretext. It was legitimate as far as during the period of time when Richard Scrushy was on trial in Birmingham but after that trial it was utilized to advance that investigation. The argument that we are making is once the grand jury has returned an indictment on that count, unless you are investigating additional counts on Richard Scrushy you should not be putting people in front of the grand jury and quizzing those people further. I can see

of no reason why Loree Skelton was placed back in front of the grand jury in December and asked questions that would revolve around Richard Scrushy's participation in this process, specifically the two hundred and 50 thousand dollar checks and her knowledge and what was appropriate and inappropriate at HealthSouth because all that information was contained in the first indictment, the second indictment and ultimately in the third indictment.

Q. If, in fact, any witnesses that testified before the grand jury after you made these statements to the government that you allege prejudiced you in some way, if, in fact, the government had -- or excuse me, if, in fact, the government put on witnesses after the indictment were sealed to pursue new and additional charges you would agree that would be proper; correct?

A. New and additional facts. You can always return charges in front of that grand jury. That grand jury is charged with having all that information that you had prior to that indictment. The problem with what was done was that you were investigating not new charges against Mr. Scrushy, you were bringing in other Defendants, and all you did was you dropped the conspiracy count and then you inserted a conspiracy count and you added a mail fraud count, honest services mail fraud, which was based on the same facts.

Q. And I understand that that's how you are characterizing

it, and you are able counsel, but is it not true that following the sealed indictment, when the next indictment came out, the first superseding indictment came out it had a plethora of additional charges against the co-Defendant in the earlier indictment, Mr. Siegelman; is that correct?
A. I don't object to those.
Q. And it also added two Defendants; correct?
A. I don't object to that.
Q. And it added a conspiracy to commit mail fraud count against your client alleging the mailing of the second appointment letter putting Tom Carman, his employee, on the CON Board; correct?
A. You had the same conspiracy count in the initial indictment.
Q. That's what your argument is, but it's a new and it's an additional charge contained in the second superseding indictment, right?
A. Well, the argument that we have is that the government included the conspiracy count, dropped the conspiracy count, and then reindicted the conspiracy count when you had all the same facts the entire period of time.
Q. Let's move on one step removed to the second superseding indictment. In that instance the government added charges relating to use by Mr. Scrushy once he got on the CON Board of his position on the CON Board to unlawfully influence

another member of the CON Board; correct?
A. You are talking about the conspiracy count.
Q. I am talking about the second superseding indictment and what we have all referred to in the conversations as the Adams piece, are you familiar with it that way?
A. I am familiar with the fact that you had a conspiracy count in the first indictment, dropped it in the second indictment, entered a dismissal order and then reindicted that same conspiracy count in the second superseding.
Q. And the government turned over the grand jury testimony to you a long time ago, right?
A. Which grand jury testimony, all of it?
Q. All of it.
A. Okay. But I did not get the presentation of the indictment to the grand jury.
Q. Did you have an opportunity to review the testimony of the grand jury that took place before you met with the United States?
A. Some of it.
Q. Okay. And isn't it true that in many instances before you ever spoke to the United States the government was calling witnesses related to the activities of the CON Board and these witnesses were testifying after the first sealed indictment about voting procedures on the CON Board and when someone had to reveal a conflict and when they didn't?

A. Some of them did.
Q. Okay. Then after we met with you there were two or three more called that related to that same issue; correct?
A. I think that's correct, but I can't tell you numbers, but that doesn't make it appropriate.
Q. Including Ms. Skelton; correct?
A. Right, and that's where we have our objection.
Q. Okay. And so --
THE COURT: Was Skelton the only objection other than the broad objection about misuse of the grand jury process? But is she the specific example?
THE WITNESS: She is one of the examples. Our argument is that they should not --
THE COURT: Well, your argument has been one that absent the facts the Court is simply unable to follow. I mean you have mentioned Skelton and you have said they misused the grand jury, but to make that observation is to tell me the color of this room, it doesn't tell me why it's inappropriate. None of the briefs, none of the information have laid out for me what -- how the grand jury was misused in the sense of this witness had been called twice, this witness was asked the same kinds of questions, whatever might be inappropriate, and that's what I am lacking at this point. I will just be frank with you.
MR. FEAGA: Your Honor, I would like to say we are

too, and I am trying to find out what that is for the Court.
THE WITNESS: There's two cases that I cited, Beasley and Allred in the brief, and those cases have to do with the government misusing or not misusing the grand jury.
THE COURT: I know what they hold but you are giving me a proposition of law without any facts to support it. For example, Skelton was called twice, I understand she changed her testimony. Now, let's assume that the government discovered that she had lied in the first presentation to the grand jury. I don't know that for a fact, but let's assume that for hypothetical purposes. What would be wrong with calling her back to the grand jury to have her correct her testimony?
THE WITNESS: And I think that's the example that's given in Beasley, Judge, is that the witness was told that you have got a problem and we are contemplating an indictment.
THE COURT: No, you are talking about witness intimidation, I am talking about misuse of the grand jury. I mean if the government knows a witness lied you are saying they can't call that witness back in front of them?
THE WITNESS: If it was approved that they can bring that person in, but I would suggest to Your Honor if you will look at the grand jury that is not what happened here.
THE COURT: That may not be what happened here and I

haven't looked at the grand jury testimony and I will. Other than Skelton, how else was the grand jury improperly used?

THE WITNESS: Because they were continuing the investigation into the charges that they already had in place. In other words, this isn't an expansion of the indictment where you have got drug charges and now we are going into money laundering or drug charges and we are going into tax violations, all these core facts, Judge, are known to the government, they are in the hands of the government, Loree Skelton has been in the hands of the government for months and months and months.

THE COURT: And my problem with that argument is it's just a global argument that gave the Court no specificity about why that's so. Now, if you want me to read the grand jury transcripts, which I frankly am going to do, and try to figure it out for myself, you put me in the position of trying to be the lawyer for both sides. That's not my job. And it's your burden to prove.

THE WITNESS: What we can do, Judge, is we can show you in a document how Loree Skelton's testimony changed, what information we provided to the government that relates to that testimony that changed, and we have the overall objection to the fact that they shouldn't be investigating that issue at all, it was already indicted. So that's our position.

THE COURT: Go ahead.

MR. FEAGA: An allegation which we flatly deny.

THE COURT: I understand that.

MR. FEAGA: Your Honor, I think given the fact that he's indicated that he is prepared to do it, I would like to ask him to do it. What is it, Mr. Leach?

THE COURT: I will tell you what, let's do this. Y'all have been here quite a while, you have been here almost four hours without very much of a break and I am cognizant of that. It's now ten minutes after 12:00, we will reconvene at 1:30 for the purpose of pursuing this line of testimony. When you get to the point where I need to close the courtroom I will do so.

Let me say for the benefit of the -- for the persons here. I'm talking about closing the courtroom. The Court is very cognizant that this is a public proceeding and the public has a right generally to be at all such proceedings in this Court. However, the Court also must balance the Defendant's 6th Amendment right and also the Defendant's general right, which is a constitutionally protected right to be able to present and preserve a defense at the trial of this case. In making that balance the Court is going to receive some testimony in a closed proceeding about certain disclosures that were made which have been referred to as a proffer that took place in the October, 2005 meeting with

government lawyers.

I want to make clear to all of the lawyers that that proceeding, that closed proceeding will be limited solely to testimony about what that information was and any cross-examination which might be necessary to clarify it for the Court. I do not intend to close this proceeding any more than is absolutely necessary. With that, we will be in recess until 1:30.

(At which time, 12:12 p.m., a recess was had until 1:32 p.m., at which time the hearing continued.)

THE COURT: Good afternoon. It's my understanding that Mr. Dennis Bailey is present. Mr. Bailey, you wish to make some comments to the Court?

MR. BAILEY: Yes, Your Honor, if I may. May it please the Court. Your Honor, I represent the Montgomery Advertiser. I received a call about 12:30 at my home indicating that there was going to be a closed hearing today in a matter involving a criminal proceeding before Your Honor. I confess to know only what I have personally read in the papers about this proceeding, and would seek instructions from the Court or an on the record explanation of the justification for a closed hearing in a criminal proceeding, which obviously is a matter of great public concern.

THE COURT: Mr. Bailey, I made such an observation earlier, but I certainly understand the concern of the

members of the press and I will be happy to do so for your benefit if no other. This closed session relates to statements that were made during a meeting that took place in October of 2005 between lawyers for Mr. Scrushy and the prosecutors in this case. During that meeting lawyers for Mr. Scrushy made some disclosures about facts and theories which are, as they describe them in pleadings to the Court, were fundamental to their defense and important to their defense.

It is my judgment that the proceeding during which that disclosure is made to the Court, in other words, I need to know what they said, should be closed. I make that judgment in light of the importance of the public nature of this proceeding, but also the necessity for the Court to balance the Defendant's 6th Amendment right. And it is my judgment that it's appropriate to close the proceeding for the very limited purpose of allowing counsel to tell the Court what was said about certain facts and certain defenses that Mr. Scrushy has. And as I stated this morning, the proceeding will be closed for that limited purpose, and I would be very strict in not allowing anything else to occur other than an explanation to the Court what of what those facts are. Mr. Scrushy, in order to prevail on his motion, is required to demonstrate prejudice and I must know what those things are in order to make a judgment about whether he has been prejudiced by certain actions of the prosecutor.

MR. BAILEY: Your Honor, have you explored any other alternatives than to hold a closed hearing?

THE COURT: I have thought about what other alternatives there are, and unfortunately the only other alternative would be for the lawyers to file pleadings under seal, but unfortunately those -- there's a fact -- potentially a factual dispute about what was said and nobody can cross-examine written materials, so --

MR. BAILEY: Your Honor, will the proceedings be made public, depending on the outcome of the hearing?

THE COURT: You mean would a transcript be made available?

MR. BAILEY: Yes, sir.

THE COURT: That's possible after the conclusion of the trial, or at some other point if counsel advised the Court that there's no need to continue the sealing. After the conclusion of the trial I would not know of any reason why it wouldn't be made public. Counsel is agreeing with that.

MR. BAILEY: Am I correct in understanding that the factual evidence that is about to be presented, if released to the public, is believed to be substantially -- could probably imperil the ability of the Court to impanel a jury, is that --

THE COURT: It's not so much that as disclosure to the public might impair the Defendant's ability to defend

himself. That might include difficulty in impaneling a jury but I think it goes beyond that, Mr. Bailey. Counsel, y'all know more about what is going to be said than I do at this point, so I am a little bit in the dark when I make these observations.

MR. BAILEY: Has the Defendant moved for a closed hearing?

MR. HELMSING: Yes, we did.

THE COURT: Yes, Mr. Helmsing earlier asked.

MR. BAILEY: Is there a written motion setting forth the grounds for that?

THE COURT: There is not. It was done orally.

MR. BAILEY: When was that request?

THE COURT: It was made this morning.

MR. BAILEY: Your Honor, just on behalf of the Advertiser we would like to respectfully object to the conduction -- conduct of a meeting under these circumstances with this element of notice for the record.

THE COURT: And thank you, Mr. Bailey. The objection is overruled for the reasons that the Court has stated. The Court finds that a -- that the Defendant's 6th Amendment right in this regard outweighs the public's right to know. You may rest assured that the closed session the Court will hold will last no longer than is absolutely necessary for the Court to understand some factual and legal matters and we

will be back on the record in open session.

MR. BAILEY: May I be excused?

THE COURT: You may. Thank you, Mr. Bailey. And with that, ladies and gentlemen, all persons who are not parties to this litigation or who are not lawyers involved in the litigation, you may be excused and we will open the courtroom as quickly as possible. Counsel, I would request that you assist the Court in enforcing the closure.

(At which time, 1:38 p.m., matters were taken up by the Court and parties under seal and not included in this transcript, after which time a recess was taken at 2:02 p.m., after which, commencing at 2:11 p.m., the hearing continued.)

THE COURT: We are now reconvened in open session. You may proceed, Mr. Feaga.

MR. FEAGA: Just a couple more, Your Honor.

Q. Mr. Leach, I just want to make sure that I understand your testimony. That is, that sitting here today even if you knew that your client had been indicted as he has been in this case, that you would sit down and talk to the government, proffer information and attempt to resolve that case if it were possible to do so.

A. Well, obviously today I do know that he is under indictment, and if the representation from the government is that he could gain a dismissal, yes, I would sit down with the government and talk to them about that and try to proffer

information and try to discuss our way through so that he could be --

Q. You would have the same type of conversation, reveal the same things that you revealed earlier in these other meetings you have talked about, even if you knew that you were under indictment. In other words, there's nothing you said at that other meeting that you wouldn't say at this prospective meeting now if you thought it would benefit your client and you thought there was a possibility of negotiating a resolution of the case?

A. The only thing that's missing in your question now that I heard the first time is the dismissal. If what you are saying to me is that Richard Scrushy could be dismissed and go home, yes, 24-7 I would sit with the government and talk with them.

Q. And that was your understanding at these earlier meetings is that was something that could happen, right?

A. It's different in that my understanding at the earlier meeting was that he could get a pass. The term pass was actually utilized. Among prosecutors that means that he won't be indicted and won't have to go through that. So it's substantially different. But I have answered your question even as of today.

Q. And his status would be substantially different but your willingness to discuss it as long as it meant he was going to

walk away wouldn't change at all.
A. For dismissal, is your question; correct?
Q. Correct. And your understanding you say at the time based on the conversation was you didn't think he had been charged at all.
A. Right.
Q. So you were looking for a pass there too, right?
A. Correct, yes, sir.
MR. FEAGA: No further questions, Your Honor.
THE COURT: Mr. Helmsing, anything else?
MR. HELMSING: No, sir, Judge.
THE COURT: All right. Thank you. Any other witnesses for Mr. Scrushy?
MR. HELMSING: No, sir.
MR. FEAGA: Your Honor, the United States calls Mr. Richard Pilger.
THE CLERK: Do you solemnly swear or affirm that the testimony you give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God?
THE WITNESS: I do.
RICHARD PILGER, witness for the Government, having been duly sworn or affirmed, testified as follows:
DIRECT EXAMINATION
BY MR. FEAGA:
Q. Sir, would you tell the Court your name.

A. Richard Pilger.
Q. And where do you work, Mr. Pilger?
A. I work at the United States Department of Justice, public integrity section, Washington, D.C.
Q. Pursuant to your duties and responsibilities as an attorney with the public integrity section of the United States Department of Justice have you had occasion to be assigned to work on the case that you have been privy to this hearing on and the matters that have been discussed during this hearing?
A. Yes, I was assigned to this case in approximately April of 2005.
Q. Mr. Pilger, I want to direct your attention to a date October the 4th, 2005, and ask you if you recall on that date engaging in a meeting with Mr. Art Leach, Mr. Les Moore, Mr. Lewis Gillis and a fellow named Mr. Whitehead?
A. I don't remember all the names, I remember Mr. Leach. I remember that meeting, yes.
Q. Do you remember whether or not Mr. Moore was there?
A. Yes, Mr. Moore was there.
Q. Would you tell the Court what your understanding of the purpose of that meeting?
A. Yes. My understanding was that Mr. Scrushy's counsel had contacted Louis Franklin and had asked to meet to consider a possible cooperation agreement. It's my understanding they

called and asked if there was a way to work something out towards a cooperation agreement and that was the purpose of the meeting.
Q. And was the United States amenable to meeting with them?
A. We were. Our position was we would meet with them and we would consider whatever proposal they had.
Q. Okay. And so did the meeting take place?
A. It did.
Q. Would you tell the Court generally how the meeting progressed, what happened?
A. The meeting started with counsel for Mr. Scrushy asking questions for about 20 minutes. Mr. Leach asked questions primarily of Mr. Franklin about the government's evidence, the factual progress of the investigation to date. After about 20 minutes of that Mr. Leach engaged me on a discussion of the law that might apply to the facts.
Q. Okay. And at some point in time in your discussion with Mr. Leach after these preliminary matters -- well, before I go there, are you telling the Court that the government gave the defense a picture of the events and facts that the government believed its investigation had discovered?
A. We did. Absolutely. It's usually the way these meetings go and I remember thinking this isn't surprising we are going to sit and tell them early discovery.
Q. Okay.

MR. KILBORN: Can I ask the witness to speak up a little bit? I am having a hard time hearing him.

THE WITNESS: I'm sorry, sir, I will try to do so.

THE COURT: Pull that microphone a little bit closer to you.

Q. And then you say you engaged Mr. Leach in a discussion about the law, would that be the law in terms of each of your opinions about how the law applied to the facts that you had discussed?

A. It was. It was basically as Mr. Leach described, it was me explaining why I thought the Hobbs Act could apply to the facts as the government understood them and him trying to persuade me that they wouldn't apply.

Q. Now, at some point in time during this period of time, I think you heard Mr. Leach say that things got heated, would that -- would you describe your view of the discussion you had with Mr. Leach that he was characterizing as having gotten heated.

A. I remember it being heated only at the end of the meeting when everyone stood up and Mr. Leach was quite angry with me at that point. Otherwise I mean we were stating our positions about the Hobbs Act to each other forcefully and Mr. Leach strongly disagreed with me. I didn't feel there was anything inappropriate on either side with that conversation, but it was fast paced, yeah.

Q. Now, you have had an opportunity to read the pleading that's been filed by Mr. Scrushy's lawyers in this case, right?
A. Yes.
Q. Did you -- do you recall in there they allege that at some point in time there's an affidavit from Mr. Moore where he says that you used words to the effect that you have to testify in a particular way or we are going to charge you. Do you remember it happening that way?
A. No. It was a routine discussion of the government's understanding of the facts with the routine reply from the Defendant that you have got your facts wrong. And what I recall is, either Mr. Moore or Mr. Leach did in the course of the rapid exchange put it to me well, you just want him to testify the way you want or you are going to charge him, and I remember stopping and saying no, of course not. What we want is what we always want, if we are going to have a cooperation agreement he has to agree to testify truthfully and fully.
Q. Now, do you remember any discussion during this time that we -- the government met with the attorneys for Mr. Scrushy where a question came up about whether or not a charging decision had been made?
A. I did.
Q. Would you tell the Court what you remember about that

part of the conversation.
A. What I remember was they asked the question and I heard a question in terms of are you seriously willing to consider a deal that would involve Richard Scrushy getting a pass as Mr. Leach described it. And I remember the question or my answer, I can't say which, I can't overstate it, but either the question or the answer had the word final in it. Either they asked me has a final decision been made or I answered a final decision has not been made. But I understood that question, the purpose of that question to be are you for guys real, is there a purpose to this discussion, should we be talking to our client and to you further about this.
Q. And in your view was there a point and did you communicate that to them?
A. I knew there was a point, that was the department's position and my instructions that we should consider any possibility they care to bring to the table.
Q. So it was on the table at that time.
A. It was.
Q. And your understanding of the question you were being asked was was that on the table.
A. Yes.
Q. And your answer was deliberately designed to communicate back to them that yes, it was.
A. It was. And I was also aware of the sealed indictment

and I remember thinking we are going to be touching on this area and I was not comfortable with that but I don't feel that they put that question to us, is our client indicted. I felt the question put to us was is this for real, are you serious about this.

Q. Now, another allegation in the pleading is that when the government moved to seal the original indictment that occurred on --

THE COURT: Before you go there. What would your response have been if they had said has my client been indicted?

THE WITNESS: I think, Your Honor, we would have had to step out and confer.

THE COURT: Which would have been an answer in and of itself.

THE WITNESS: It was a very difficult position if they had asked that. And we couldn't have lied to them, I know that, and we did not intend to lie to them. The understanding we had going in was this is a preliminary meeting between lawyers and if this gets to the point where we are actually seriously going to get -- sit down with Richard Scrushy and take his proffer where he will be bound, then we are going to have to disclose this, we are going to have to get this before the Court and make that disclosure.

THE COURT: Go ahead, Mr. Feaga.

Q. I want to direct your attention to the original indictment that was returned in May of 2005, six months before the superseding indictment, five months before this meeting took place with Mr. Leach and his co-counsel. One of the allegations in the pleading filed by the defense is that the government deliberately misled the Magistrate Judge when it filed a motion to seal that indictment. Do you recall the government filing a motion to seal that indictment?

MR. LEACH: Judge, I just object on the basis that that's really not what we are saying. We are saying there's two parts to it, the first part was totally legitimate until the end of the trial, so the rest is pretext.

THE COURT: I understand your position.

MR. FEAGA: I am just trying to get to the meat of it, Your Honor, but I have no objection to Mr. Leach helping me frame the issues.

THE COURT: Get to the meat of it. We are all -- everybody in this little group are lawyers so I don't know that we need to be quite so coy with each other about these matters.

MR. FEAGA: Yes, sir. As I have stated to opposing counsel that I recognize that I may not be as good at it as others.

Q. But let me say this, Mr. Pilger, there were two grounds stated in that motion to seal that indictment; is that right?

A. Yes.
Q. And one of the grounds was that there was an ongoing trial involving Mr. Scrushy; is that right?
A. The trial in Birmingham, correct.
Q. And what was the other ground?
A. That the grand jury was going to continue with its ongoing criminal investigation as to other matters involving the investigation that had gone on to that point.
Q. Okay. Was the grand jury going to continue its investigation into matters that had been ongoing up to that point?
A. It was and it did.
Q. And, in fact, it did, that's what I am getting at; is that right?
A. Yes.
Q. All right. Now, when the jury came back in Birmingham and acquitted Mr. Scrushy in the fraud case up in Birmingham, in the Northern District, did it -- at any point in time was there any discussion on the part of the government that we needed to file anything with the Court to say hey, one of the grounds that's in here is no longer in play?
A. Not to my knowledge. It was my understanding that the ongoing investigation was a sufficient and well founded reason to keep the indictment sealed and I knew the investigation was proceeding in the grand jury.

Q. Now, one of the allegations in the pleading, and I am sure Mr. Leach will correct me if I have got it wrong, is that the government used the grand jury from that point forward to strengthen the case that it had already made against Mr. Scrushy. Is that true?
A. We used the grand jury to bring new and different charges, is what we used the grand jury to do. And you can see that in the indictments. We brought a superseding indictment that was much more involved, added Defendants, added complex legal theories, and it was a much different, bigger indictment. And then subsequently we brought to the grand jury a second superseding indictment which further changed the charges.
Q. In fact, isn't it true that you and, in fact, other members of our government team were all aware of and discussed the fact that it's impermissible to use the grand jury to strengthen an already existing indictment if that's your sole reason for doing it; is that right?
A. If that's the sole reason, correct. We understood that we had to be careful to not go back to the same ground simply to strengthen something we were already intending to do, and that we needed a purpose of bringing broader charges, which we had and which we did.
Q. Okay. So, then it's your testimony that the government did not use the grand jury -- did not have as a purpose and

did not have as any motive using the grand jury to strengthen the already existing case.
A. Correct.
Q. Now, a corollary part of the allegation is that somehow after meeting with Mr. Leach and having the discussions that you have testified to having had with him on the 4th of October, that the government then used the grand jury to develop information that was obtained only because of revelations he made in this meeting on the 4th of October; is that your understanding of part of the defense pleading?
A. That's what I heard Mr. Leach say he thought might be happening, but it's completely wrong. The matters that we pursued and the matters that were addressed to the Court in the closed hearing were matters that were already under way, matters that we had already had discussions about with the witnesses involved, of a piece of things that we were doing before the October 4th meeting. And the bottom line is what came out of that October 4th meeting was nothing. We felt that nothing had been put in front of us. We felt that it had been a waste of our time.
Q. Now, do you remember the government calling prior to the October 4th, 2005 meeting with Mr. Leach and other co-counsel for Defendant Scrushy that the government called people such as Carol Giardina, Melissa Galvin Mauser, Roosevelt McCorvey and Borden Ray to the grand jury?

A. Yes, we did.
Q. What is your recollection of why the government was bringing witnesses like that before the grand jury before we ever met with Mr. Leach?
A. We were developing a piece of the second superseding indictment that concerned the corruption of the CON Board by Mr. Scrushy. There was a progression from the indictments -- through the indictments as they pertain to Mr. Scrushy. The very first indictment was very streamlined and intended to address the statute of limitations problem. It charged a 666 federal funds bribery as to the giving and receiving of a bribe and a conspiracy concerning the bribery and money laundering. The second indictment which came in October of 2005 expanded the charge against Mr. Scrushy in a direction we were heading at that point concerning use of the CON Board as the specific further purpose of Mr. Scrushy in paying the bribe. Initially the first indictment focused on him getting himself on the CON Board which was and is our evidence. The second indictment in the added mail fraud count focuses also further and differently on his purpose to include Thomas Carman, his successor on the CON Board. And in the third and final we had developed further evidence through the witnesses you mentioned and others, we added and increased charges to show that he intended to corrupt the CON Board in other specific ways using conflicts of interest he would generate

with other members of the CON Board. Which isn't to say that's any of the people you named but we were developing evidence of that through the grand jury before we ever met with defense counsel.
Q. So then do you recall the name -- have you been provided with a list of the witnesses that were called to the grand jury after the meeting on October the 4th with Mr. Leach?
A. I have seen that list, yes.
Q. Okay.
MR. HELMSING: Could you speak up a little bit or pull the microphone down?
THE WITNESS: I can't move the microphone closer.
THE COURT: Well speak up then.
THE WITNESS: I will speak up.
MR. HELMSING: Thank you.
Q. And isn't it true that only four witnesses were called before the grand jury after that meeting?
A. I believe that's correct.
Q. And that would be out of dozens and dozens and dozens that were called for that grand jury during the time that it sat; is that right?
A. I think that's accurate.
Q. One of those is someone named Derrell Fanchard, do you remember that name?
A. I do.

Q. What do you recall was the reason the United States called Derrell Fanchard to the grand jury?
A. Derrell Fanchard was able to provide testimony concerning PET Scanner application, prepared by a member of the CON Board. This member of the CON Board was recruited to have employment from HealthSouth doing PET Scanner work while he was sitting on the CON Board. He was recruited with Mr. Scrushy's knowledge to receive income from HealthSouth while a member of the CON Board.
Q. And that's the theory of the government's case in regards to that; is that right?
A. That's correct.
Q. Okay. And so then is it your testimony that that had nothing to do with strengthening the issue that we had discussed with Mr. Leach of whether or not Mr. Scrushy paid a bribe to get on the CON Board?
A. It had nothing to do with the conversation of October 4th, it was something that was well under way in negotiations with witnesses and in witness appearances in the grand jury before and after the October 4th meeting.
Q. How about Carlton McCurry, would you characterize Carlton McCurry's testimony the same way?
A. Yes.
Q. Loree Skelton, you have heard her name mentioned in here.

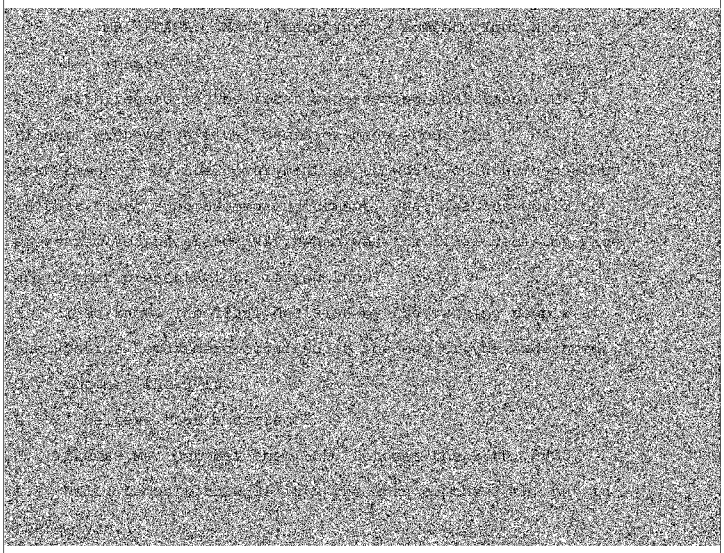
A. I am not sure Carlton McCurry was speaking directly to that PET Scanner application, but he was testifying on the same CON Board topic.
Q. The same subject matter.
A. Correct.
Q. That being this allegation of misuse of Mr. Scrushy's position on the CON Board to unlawfully influence another member of the CON Board.
A. Correct. The allegations we put before the grand jury for the second superseding indictment that they returned and charged Mr. Scrushy with that conduct.
Q. Now, that matter that you are talking about, that was not a part of the first indictment; is that right?
A. No, the first indictment focused on Mr. Scrushy buying the CON Board seat for his immediate occupation.
Q. Now, I want to go if I can to Loree Skelton. Do you remember the United States putting Loree Skelton before the grand jury?
A. Yes.
Q. What is your recollection of why Loree Skelton was called before the grand jury?
A. Loree Skelton had information concerning Mr. Scrushy's relationship with Timothy Adams, a member of the CON Board who became employed by HealthSouth doing PET Scanner work.
Q. Was she asked questioned about that?

A. She was.
Q. And was she also asked questions about whether or not she knew anything about the two hundred and 50 thousand dollars and/or the two two hundred 50 thousand dollar contributions that were made by HealthSouth that we had discussed with Mr. Leach was part of our case on October 4th?
THE COURT: You are talking about her second appearance before the grand jury.
MR. FEAGA: Yes, sir.
Q. In both instances -- in other words, this is during her second appearance that she was asked questions about her relationship with Tim Adams; is that right?
A. She was asked questions about the relationship with Tim Adams. She was asked questions about her knowledge of the two hundred 50 thousand dollars, but that had nothing to do with the meeting with Mr. Leach, that had to do with her having explained to us that the reason she didn't react to the corruption she was witnessing with Mr. Adams was in part because she didn't know that Mr. Scrushy had paid a five hundred thousand dollar bribe to get CON Board access.
Q. Is there -- in fact, if the Court exams her testimony it will find that she, in fact, says in that testimony that had she known about that five hundred thousand dollars she would have had a very different reaction to what her involvement was with Tim Adams; is that right?

A. That's right. There's another reason I believe the two hundred 50 thousand came up which was -- I wasn't at the first grand jury appearance, but my understanding is she had misspoken about when she was aware of interaction with Mr. Adams, and I think we were talking to her about that and trying to put it in relation to the two hundred 50 thousand dollars before we ever met with Mr. Leach.

Q. Okay. So you are saying that another reason she came to the grand jury was to correct her earlier testimony?

A. That was.



Q. Whatever date the indictment was returned, that was the date.
A. Yes.
MR. FEAGA: That's all, Your Honor, for this witness. Thank you.
THE COURT: Cross-examination.
CROSS-EXAMINATION
BY MR. LEACH:
Q. Mr. Pilger, exactly what date was it that the organized crime and racketeering section turned you down on the RICO for Richard Scrushy?
MR. FEAGA: Objection, Your Honor.
MR. LEACH: He brought it up.
MR. FEAGA: I am going to object on the basis that it gets into the deliberative process of the United States government.
THE COURT: Well, the date doesn't. Answer the question.
A. Yes, Your Honor. To my knowledge there was no date where the organized crime section said you can not do this proposed indictment or that proposed indictment, we had an ongoing approval process with them.
Q. All right. My question was when did the organized crime and racketeering section tell you no on a RICO count for that man? Was that the day before the indictment?

A. I understand your question, Art. We didn't put in front of them an indictment where we said this is our final product, we want to indict this, we had an ongoing discussion with them. And I think if you are asking me what were the deliberations about the prospects for charging Mr. Scrushy with RICO, that under the deliberative process privilege I am not going to be allowed to answer that.
Q. Well, let me put it to you this way so you can just answer yes or no. Isn't it true that you sought a RICO indictment or a RICO conspiracy indictment against Richard Scrushy, yes or no?
A. I have to answer with an explanation, so I will say no with an explanation, if you will allow it.
Q. Yes, sir, of course.
A. We never put together a formal proposal the way -- if you did your work in the organized crime field you know -- and had the indictment reviewed on that particular charge to my recollection. That was something that was certainly discussed, but again, you know you are asking me to produce deliberative process and I am not supposed to do it, so --
Q. Okay. Let's not talk about the indictment that was proposed, let's talk about your pros memo. A pros memo was prepared and submitted to the organized crime and racketeering section for Richard Scrushy's RICO indictment; is that not true?

MR. FEAGA: Your Honor, the United States has to object because it invades the deliberative process that went on within the department.

THE COURT: I am inclined to agree. Even the fact that they considered it and may have rejected at some point. Let's move on. Sustained.

Q. Isn't it true that Loree Skelton initially told you that Richard Scrushy did not know about Tim Adams participating in that PET Scanner application for the CON Board?

A. I wasn't there for the initial grand jury or interviews. To the best of my recollection she initially said something about Mr. Scrushy would have known about it but she was unclear or confused about when he knew about it. That's my recollection of her initial position.

Q. Isn't it a fact that in her grand jury testimony she said that he knew about it after the fact, were her exact words?

A. In the initial grand jury?

Q. Yes, sir.

A. That could be. I mean if you would like for me to look at the grand jury transcript I can tell you one way or the other.

Q. All right. And do you recall whether or not Loree Skelton was told that she was going to be indicted?

A. Loree Skelton was -- we negotiated with Loree Skelton

about whether she should be a target of the investigation. I do not recall telling her she was going to be indicted, no.
Q. Well, just for those of us who don't know the vernacular, when you tell somebody they are a target, that means that they are actively under consideration for indictment, they are a primary objective of the investigation; isn't that correct?
A. When someone is a target of the investigation, to be perfectly accurate, that means, according to the U.S. Attorney's manual, that they are likely to be indicted.
Q. And did you in that regard call HealthSouth and inform her employer that she was not cooperating with the investigation? And I use you broadly, you, the government.
A. There did come a time when HealthSouth called me because they had received a request from Loree Skelton to access some documents and asked me to tell them whether she was a target of the investigation. I declined to address that issue but I did tell them at that point we did not see her as someone who was cooperating with the investigation.
Q. And are you familiar with what happens to HealthSouth employees who do not cooperate with government investigations?
A. No, I am not.
Q. Do you know of any folks that did not cooperate with the government's investigation in Birmingham that were fired?

A. I actually don't know very much about that, no.
Q. Did you think that it was a likely result of your conversation with the Birmingham folks at HealthSouth that Loree Skelton would be fired?
A. I didn't think about that. What I thought about was they were asking me should we involve her in searching for documents you have asked for concerning her. And my obligation is to make sure she couldn't do anything to those documents if she was inclined to do so. So I informed her as discretely -- informed HealthSouth as discretely as I could without referencing her status as a target or subject that they should not let her have access to the documents, they should not use her while they were retrieving them.
Q. You testified about the first indictment, second indictment, and third indictment in this case, and I want to ask you what were all of the charges in the first indictment?
A. All the charges of the first indictment to my recollection were a conspiracy to commit 666 bribery and money laundering, and the 666 with aiding and abetting counts charging both Governor Siegelman and Mr. Scrushy.
Q. What were the charges in the second indictment with regard to Mr. Scrushy?
A. In the second indictment he was charged with a mail fraud, honest services fraud, the original 666 counts, and I can't recall if the money laundering was there or not.

Q. What happened to the conspiracy count?
A. The original conspiracy count we felt was unnecessary because we had a mail fraud scheme which was going to enable us to do the same kind of things in the courtroom that we usually do with a conspiracy count.
Q. What did you do with the conspiracy count?
A. I don't know if we did anything formally with the Court.
MR. LEACH: May I approach, Your Honor?
THE COURT: You may.
Q. I am going to show you two documents just to refresh your recollection. Ask that you examine those documents and tell me if that helps you.
A. It's a motion for leave to dismiss the indictment which I assume was what we filed here in Montgomery.
Q. You see the date of that document, the motion that was filed? It's on the very top in blue.
A. It says November 3rd, '05.
Q. Okay. And do you recall the date of your second indictment?
A. Second indictment was in October, the 26th or 27th.
Q. So is it obvious to you that what that is doing is dismissing the first indictment?
A. Yes.
Q. Okay. Which means that the conspiracy count is dismissed at that point; is that correct?

A. The original conspiracy count, correct.
Q. All right. Now, fair to say that at that point there's no conspiracy count pending against Richard Scrushy; is that correct?
A. I think that's right.
Q. All right. What happened in the third indictment?
A. In the third indictment a conspiracy encompassing all of Richard Scrushy's conduct was included, including the Tim Adams piece that we had developed.
Q. All right. Now, what is the difference between the original conspiracy count and the conspiracy count in the third indictment? Number one, was it a 371 conspiracy?
A. I believe it was.
Q. All right. Were there aspects of the third indictment conspiracy count that were identical to the original conspiracy count?
A. Well, yeah, like Richard Scrushy did it.
Q. No, like different portions of it. Do you need to see it in order to --
A. Yeah, if you could put it in front of me it would be helpful. But my understanding is that they are going to be similar in that Richard Scrushy pursuing corruption with Don Siegelman concerning HealthSouth's position on the CON Board, and you are going to start out with less and proceed to more in terms of the scope of the conspiracy.

Q. All right.
A. And also the nature of the conspiracy changed from simply conspiracy to commit federal funds bribery and money laundering to conspiracy to commit broader mail fraud which we had developed.
Q. And the mail fraud was in your possession as of the second superseding indictment; is that correct?
A. Part of it.
Q. All right. And would you grant me that some of the very same language is used in that 371 count going from the first to the third indictment?
A. Well, probably. I mean the charging language for a 371 is going to be about the same. Some of the setup and background information to explain who is who is going to be the same. The fundamental nature of the conspiracy to pursue corruption involving HealthSouth and the CON Board is going to be the same. What we had developed were particular aspects and charges that related to the conflict of interest corruption that Mr. Scrushy pursued, that came to fruition in the third indictment.
Q. All right. And isn't it true that the Tim Adams part of it is referenced in the second indictment as well?
A. I don't think so. If you will show me what you are thinking of I will address it.
Q. Is it your testimony that the Tim Adams portion of the

indictment doesn't appear until the third indictment? And I can show them to you if you would like.
A. Yeah, that would be helpful.
MR. LEACH: Your Honor, if I may approach.
THE COURT: You may.
Q. I am showing you all three indictments, and I have got it tabbed to the portion that relates to Richard Scrushy.
A. If you could help me out as to what portion you think of the --
Q. Really what I want you to do is I want you to compare the conspiracy, the 371 in the first and the 371 in the third, and I want to know what additional information went into the third indictment.
A. Well, I can tell you the additional information that went into the third indictment was the piece concerning Timothy Adams corruption. I do not believe that the first indictment was meant to encompass that conduct.
Q. Clearly. How about the second indictment?
A. There's no conspiracy in there. Which part of the indictment would you like me to look at?
Q. I am talking about was the information relating to Tim Adams in your possession at the time of the second indictment, whether it be in the mail fraud or any other section of that indictment?
A. Some of it was but we didn't feel it was enough to

charge at that point, correct.
Q. What part of it was in that second indictment?
A. We had testimony from Timothy Adams. At that point we did not have Loree Skelton's testimony.
Q. And you returned charges based on that; is that correct?
A. In part. I mean we developed a lot of other evidence concerning the Timothy Adams corruption at Mr. Scrushy's direction, yeah.
Q. So it's fair to say as time went by you are improving the case against Mr. Scrushy in front of the grand jury by use of testimony of witnesses who were appearing in front of the grand jury to include Loree Skelton; is that correct?
A. No, it's not correct. We were pursuing additional broader charges, which are reflected in the third indictment, which show conspiracy to commit other offenses that we had charged previously and concerning other conduct.
Q. And we are back to the fact that you had a 371 conspiracy, dismissed it when the second indictment came out and then reinstated it in the third indictment; is that correct?
A. I will quibble with you on reinstated it. It's a different conspiracy charge in the third indictment. You can see that on its face.
Q. All right. Now, in the discussions with the lawyers for Mr. Scrushy do you recall it being specifically related to

you that Nick Bailey was incorrect about the meeting where the first check was delivered? Do you recall that?
A. I don't actually recall that. My understanding of this part of the case has never focused on us needing to have a perfect account of how the money was delivered. My understanding of this part of the case is there is some doubt about where and how the money changed hands. The issue being did it change hands pursuant to a deal where Mr. Siegelman was being bribed by Mr. Scrushy. So, I don't know if I have addressed your question.
Q. Let me ask it to you this way. Clearly at the time of that proffer it was the position of the government that the IHS check was delivered on that first meeting, what we call the bury the hatchet meeting, and that Nick Bailey saw -- contends that he saw Mr. Scrushy and saw the check; was that your position on that day? And I say generically, the position of the United States at that meeting.
A. I don't think it was, Art. I think what we were thinking was we are not exactly sure. We know Nick Bailey said something to that effect and I don't recall that right now, but I also remember we were thinking we don't know exactly how this is delivered, but that doesn't matter.
Q. All right. Since the time of that meeting is it fair to say that Nick Bailey has now retreated from the proposition that the check was delivered at that meeting?

A. I don't know that.
Q. Has that been related to you by anybody else within the defense camp -- the government camp? Excuse me.
A. If it's true, and it may have been, it's not something I have in mind right now, no. Again, that that point -- my understanding has always been that that point is not particularly important to us.
Q. But my question to you, Mr. Pilger, was whether that information has been related to you either by agents or other prosecutors within the government's camp.
A. I don't recall that it has, no.
Q. Fair to say that that was one proposition that was put to you at the meeting on October 4th during the proffer?
A. It's the same answer, Art. I don't remember it coming up. It wasn't something that really mattered to us.
Q. You started your testimony by talking about the meeting was all about cooperation, a cooperation agreement.
A. That was my understanding of the purpose of the meeting.
Q. But you also admit that the meeting was a discussion about receiving a pass; is that correct? Did I understand that?
A. You are correct in that you quickly put on the table that Mr. Scrushy wanted a pass. We understood that he would want that coming in and we were willing to talk to you about that, so to that extent, yes.

Q. All right. So when you talk about a cooperation agreement, it is consistent with the proposition that Mr. Scrushy would receive a pass which means he would not be prosecuted; is that correct?
A. That's correct.
Q. Do you recall a discussion that we engaged in during the legal part of this, legal and factual part, in which you stated that threats to Mr. Scrushy would be enough of a violation; do you recall that?
A. I don't recall that. I can tell you right now that in a situation where someone is threatened by a public official with adverse official action unless they pay money, that would be a violation of the Hobbs Act. We had an extended abstract discussion of the Hobbs Act, we sure did.
Q. And under those circumstances that individual would be a victim.
A. Under those circumstances.
Q. Okay.
A. I also went on to explain to you under what circumstances someone who pays a bribe would be charged and held accountable for participating in the offense.
Q. And that's where we ended up in a discussion about quid pro quo; is that correct?
A. I still don't see that as the right jargon, but I don't know that it matters. I think it was a discussion of how

aggressively does the payor go after the deal and what do they look for in the deal and how do they use the deal to their advantage as opposed to simply protecting themselves from someone whose MO is to shake down people with money. That's what I recall.

Q. Do you recall the question being put to you what will happen if Mr. Scrushy does not state the facts as you see them, and do you recall saying in response he will be indicted?

A. No. What I recall is you or maybe Mr. Moore getting heated by this point and trying, I thought rather pointlessly, to put me in the box of saying the wrong magic words. This was a routine discussion about couldn't we come to an agreement towards -- cooperation agreement, I should say, with Mr. Scrushy. And Art, if you had said to me are you saying we have to testify this way or you are going to indict us, I would have said, and I know I did say during that meeting at some point, which is any cooperation agreement is going to be for truthful testimony.

Q. In your direct examination you testified to the fact that the word final in the area of a final decision was actually stated by somebody in the room, do you actually have recollection today of stating that no final decision had been made with regard to prosecution?

A. I do. I can't overstate it. I think either the question

had it in there or the answer had the word final in there, but that is how I remember it.
Q. Prior to the meeting with the defense team did the members of the government team have a discussion about the prospects of inadvertently revealing the sealed indictment?
A. We -- as I said before, we determined that if we got to the point of actually meeting with your client, of actually taking a proffer from him, something that might bind him in any way that we were going to have to disclose it then. We did not, I wish we had, cover the ground of what happens if they touch up against this. The discussion was pointedly about the fact that the point at which we really have an obligation here is if we are actually going to get in a room with this man pursuant to a cooperation agreement.
Q. So if I understand what you are saying, it was discussed but only with regard to the prospect of taking a proffer directly with Richard Scrushy.
A. Right. Our understanding, other than getting in the room with the man, a man who has rights, getting in the room with lawyers was a different matter. And at that point we were still conducting ongoing grand jury investigation and we are still under the Court's seal for good reason, and we weren't going to compromise that until we get to the point that this was real on your side and your client was showing up.
Q. What were those reasons? What was the fear that you had

about going to Judge Coody, getting a limited unsealing order even if it doesn't include giving me the indictment, just to tell me, what were those reasons?
A. The concern that we had witnesses who were subject to being interfered with, that we were still looking for documents. The standard concerns, Art, that come up in an investigation before you have to decide, you know, where you are going to go and get the information in hand. And, you know, witnesses like Loree Skelton who still worked at HealthSouth. I mean you -- the courts routinely seal these indictments pursuant to an ongoing investigation for a reason, and you know those reasons.
Q. Right. But my question to you is, what legitimate reason did you have to fear that this defense team would do anything with regard to Loree Skelton?
A. Are you asking me what concerns I have about what Richard Scrushy might do in the context of a criminal case? Do you really want me to answer that? Because it seems to me we had a well-founded concern that he might try and interfere with the course of the proceedings.
Q. Well, you knew that Richard Scrushy had been investigated and indicted in Birmingham; isn't that correct?
A. Sure.
Q. And that he had gone through a two and a half year investigation. Did you have any information that witnesses

were interfered with in Birmingham?
A. I believe I was aware of jurors being interfered with.
Q. By Mr. Scrushy?
A. Allegations of jurors being interfered with, sure.
Q. By Mr. Scrushy?
A. Or his team.
Q. How is that?
A. What do you want me to say? I was aware that we should be concerned that he wouldn't play by the rules.
Q. In what regard?
A. Interfering with witnesses, jurors, documents.
Q. Since the indictment in this case have you received any information that Richard Scrushy has so much as contacted any of your witnesses?
A. Since my assignment to the case I am not aware of a particular instance, no. I am aware that there was concern within the investigation that that may have been happening.
Q. Did you have any information that Mr. Scrushy ever contacted any jurors?
A. Direct information, no.
Q. Are you aware that the Court conducted a complete investigation up there on the record and that those transcripts have been released?
A. No, I am not aware of that.
Q. Have you looked at those transcripts to ascertain that,

in fact, Mr. Scrushy had no improper contact with any jurors?
A. I am not aware of that, no.
Q. Did you know in that situation where Mr. Scrushy went to the church to preach that Judge Bowdre was in the middle of that proceeding?
A. I don't know that. All I know is there was concern.
Q. Did you know that Judge Bowdre approved that Mr. Scrushy could go there?
A. Again, Art, what I know was there was concern.
Q. Did you know that that juror got dismissed in that case?
A. Art, you can retry the case all you want, my answer is the same. I know there was a concern, I don't know the details of what happened.
Q. Do you know that that juror got dismissed because of something the government did, not something Mr. Scrushy did?
A. Same answer.
MR. LEACH: If I could just have a moment, Your Honor.
THE COURT: You may.
(pause)
Q. All right. Mr. Pilger, why was Loree Skelton called back to the grand jury in December of 2005?
A. To put before the grand jury her testimony concerning the broader charges that we asked the grand jury to return.
THE COURT: Well, be more specific.

THE WITNESS: I'm sorry, I will try to be.
THE COURT: For the benefit of all counsel I am getting a little frustrated by the lack of specificity, which doesn't inure to your benefit, since you have the burden in this case, Mr. Leach. But she was called back to testify about what specifically?
THE WITNESS: It's the Tim Adams piece again, Your Honor. The corruption of another member of the CON Board by generating a conflict of interest employing him through HealthSouth while he was a member of the CON Board, which dealt with a lot of matters of financial interest at HealthSouth.
Q. In her grand jury testimony didn't you also talk about the five hundred thousand dollars worth of donations by Mr. Scrushy?
A. Right. As I testified before, we did go over that to some extent, yes.
Q. Did that have anything what so ever to do with the Tim Adams piece of your investigation?
A. Yes. As I told you earlier, she explained when we were asking her why -- you know, if you saw this going on with Tim Adams why didn't you do something about it.
Q. Saw what going on?
A. The corruption of your client, corrupting him and trying to give him employment while he is making quorums and casting

votes on the CON Board. So when we put this to her when she is finally cooperating, one of our logical questions is the evidence that you saw, why didn't you say something about it? And part of the answer has to do with she didn't know he had paid five hundred thousand dollars as a bribe to Governor Siegelman. That wasn't something she knew about and that's one thing we questioned her about in the grand jury in December, because it goes to what she knew and her credibility on the Tim Adams piece.

Q. In her first grand jury appearance the question was asked was it an unusual thing for a check that size, two hundred 50 thousand, to be donated by HealthSouth and you not know about it? Her answer was no, sir, a check of that size to be contributed wouldn't be unusual. A smaller check, five thousand, ten thousand, normally I would be in the middle of that. The grand jury in December 7th, '05 on page 13, for counsel's benefit, now, if there had been an agreement and understanding between HealthSouth, Scrushy and/or Siegelman for HealthSouth to arrange these two contributions to take place, is that the kind of thing when you testified earlier about you would normally be involved in this process with Mr. Hince and Mr. Scrushy, is that the kind of thing you would normally be involved in? And her answer is yes, sir at that point; is that correct?

A. I assume so, you are reading to me.

Q. I don't see anything in this question relating to the Tim --

MR. FEAGA: Your Honor, I object to his arguing with the witness. The Court will remember Mr. Leach's testimony on this subject is very weak anyway as to whether or not there's any connection between anything he said to us and this anyway, and now he is arguing with the witness about the interpretation of the grand jury testimony, we think invading the province of the Court.

THE COURT: Well, given the nature of this proceeding I will let him have some degree of argumentative latitude with this particular witness.

THE WITNESS: I am trying to answer the questions.

THE COURT: I am not sure what the question was. Let's try it again.

Q. All right. My question is, having read you the question and answer on the first grand jury and the question and answer on the second grand jury, there's no mention of Tim Adams and it apparently has no connection to Tim Adams; am I right about that?

A. I recall you reading questions that didn't mention Tim Adams. If you are asking me my recollection of the purpose of going over the five hundred thousand dollars, regardless of where Mr. Feaga put it in the lineup of questioning, I know that it was about the evidence we were developing on the CON

Board, the broader charges that we brought. That's why she was there. And you know, if your point is did we go over something that we went over before, it's also my understanding of the law that if you happen to help yourself on the way to other charges there's nothing that's misconduct about that. You are not -- you don't have to somehow artificially point the witness at things out of context at that point.

Q. Now, in your earlier testimony did I understand you to say that you do recall my asking the question about whether a charging decision had been made?

A. Right. Well, I don't remember if it was you or Les Moore, I remember somebody asked me a question to that effect. I remember it either had the word final in it or my answer had the word final in it. I can't be clearer than that. That's my recollection. And I can certainly tell you that my understanding of the question was, what I testified, are you guys serious, and that was what my answer was intended to convey.

Q. So you recall the question being whether a charging decision had been made by the government and your reaction to that was is the defense serious; am I understanding that right?

A. Well, that's a complicated way of putting it, but yes. I am trying to tell you that when I heard that question asked I

heard the question coming from you guys are you serious? Are you really going to consider what we are talking about? Or, have you already made up your minds and this is pointless. And it was my purpose to assure you, as I understood everyone else who has ever talked to you about this had the purpose, of telling you yes, we are serious.

Q. About considering a walk, a pass.

A. If your client would cooperate truthfully, correct.

MR. LEACH: We tender the witness, thank you.

THE COURT: Anything further from this witness?

MR. FEAGA: No, Your Honor, thank you.

THE COURT: Thank you, Mr. Pilger. Your next witness?

MR. FEAGA: Louis Franklin, Your Honor.

THE CLERK: Raise your right hand, please. Do you solemnly swear or affirm that the testimony you give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Be seated.

LOUIS FRANKLIN, witness for the Government, having been duly sworn or affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. FEAGA:

Q. Sir, would you state your name for the record.

A. Louis Franklin.
Q. And for the record would you tell the Court what you do for a living.
A. I am an Assistant United States Attorney. I am the acting United States Attorney on the case before the Court.
Q. Mr. Franklin, you have sat through this proceeding today and heard a lot of questions get asked and answered. I am going to try to go straight to the point. It has been alleged by the defense in pleadings and certain aspects of their testimony that a conversation took place between you and they on October the 4th, 2005; do you remember that testimony?
A. I do.
Q. Do you remember having a meeting with them on that date?
A. I do.
Q. Do you remember having a meeting with representatives of the defense 15 months before that in roughly July of 2004?
A. I can do a little better than that, Mr. Feaga, we had a meeting with defense counsel on July the 8th of 2004.
Q. Who is we that had that meeting with the defense?
A. Myself and you.
Q. Okay. And whom did we meet with?
A. We met with Lewis Gillis, Art -- not Art Leach, Lewis Gillis, Abbe Lowell and Donald Watkins.
Q. And where did that meeting take place?
A. It took place at the law offices of Thomas, Means,

Gillis and Seay in Birmingham, Alabama.
Q. Do you remember why that meeting took place?
A. There were some discussions in our office about given the nature of these charges whether or not we should approach the targets of this investigation and tell them that they are targets, to give them a preview of what our evidence was and to just point blank ask them tell us why what we say is wrong. And we made that decision. And you were -- it was decided that because of your professional or prior professional dealings with Mr. Watkins that you would initiate contact with Mr. Watkins and see what he had to say. After you initiated the contact with Mr. Watkins he invited us to come to Birmingham and we drove to Birmingham and we met with them.
Q. Isn't it true that one of the things that we discussed with them was a detailed explanation of the allegations that we had uncovered and the evidence that we had uncovered regarding the payment of five hundred thousand dollars in two installments and the information we had obtained from Nick Bailey that this money had been exchanged in return for an agreement to appoint Mr. Scrushy to the CON Board?
A. We laid out our case at that meeting to those lawyers, we told them exactly what evidence we had that implicated Mr. Scrushy in a crime.
Q. And was one of the reasons that we did that to give them

an opportunity to tell us their side of it, to tell if there was anything wrong with what we were saying?
A. That's correct. And you also at the end of the meeting told defense counsel that if Mr. Scrushy wanted to testify before the grand jury that they should let us know. And they declined.
Q. And then we traveled back to Montgomery; is that right?
A. That's correct.
Q. Now, is it true that on or about May the 18th, 2005 an indictment was returned charging both Mr. Scrushy and Don Siegelman with various offenses?
A. I believe it was May the 17th, but you are correct.
MR. FEAGA: I apologize for that, Your Honor.
Q. Now, that indictment was sealed; is that right?
A. That's correct.
Q. Why was that indictment sealed?
A. That indictment was sealed for two reasons. During the meeting we had with defense counsel in Birmingham back in July 8th of 2004 we told them that we would not do anything, make any kind of public announcement of what we were doing here in Montgomery because Mr. Scrushy had been charged and was going to be in trial up in Birmingham. And the second reason was because we were continuing to investigate our case regarding matters of public corruption as it related to the Siegelman administration.

Q. Now, there's been some discussion, and I think the Court would like to hear from you on why when Mr. Scrushy was acquitted the government didn't come back to the Court and say oh, by the way one of these grounds is no longer in existence, we only have the one ground. Can you offer anything to the Court on that?
A. All I can say is we did not even -- it was not a thought to go to the Court and advise the Court that one of the grounds that we had stated in our motion to seal had expired. Because there was a continuing investigation, we were continuing -- I mean the grand jury continued to meet and investigate other matters, we did not tell the Court.
Q. Did the failure of the Court to do that have anything to do with us deciding we wanted to try to gain some unfair advantage over Richard Scrushy because of a failure to do that?
A. No. In fact, before the indictment, the sealed indictment was filed with the Court, there was a second meeting with defense counsel after the July 8th, 2004, I believe on August the 3rd, if I am not mistaken. I think on August the 3rd there was a second meeting between me, you, and other government counsel, including the chief of public integrity, at defense counsel's request, of course, to meet again with Mr. Scrushy's lawyers and talk about what we were doing here in Montgomery. So, it was an ongoing process.

Q. Okay. Now, I want to direct your attention to the October the 4th, 2005 meeting that occurred five months after the first indictment was returned and sealed against Mr. Scrushy and Mr. Siegelman. Do you remember that meeting?
A. I do.
Q. Would you tell the Court what you recall about why that meeting took place.
A. I believe the date was September the 29th. We were working, me, you, Mr. Pilger, Mr. Perrine and Mr. Fitzpatrick, we were all in the same location, when we received a phone call or I received a phone call from Lewis Gillis requesting a meeting. It was an unexpected phone call, requesting a meeting. And we discussed very briefly whether or not I should attend that meeting with Mr. Gillis. I explained to the attorneys that I had a personal relationship with Lewis Gillis and I thought we ought to sit down and talk with him and find out what it is they wanted to do. And after we discussed that I called Mr. Gillis and I agreed to meet with him and Mr. Gillis and I met at our office on that day.
Q. On that date, September 29th?
A. On that day he called, yes. Basically I dropped what we were doing and I went and I met with Mr. Gillis for approximately an hour. During that meeting normal pleasantries were exchanged, and we discussed -- as I recall Mr. Gillis said my commander in chief told me that I needed

to meet with you folks down here in Montgomery and find out what we were doing. I explained to him that our grand jury was continuing to meet and that we had not stopped doing what we were doing, we were still investigating. And we talked about the possibility of working this case out, reaching some kind of agreement as it relates to Mr. Scrushy. I explained to him that that was still viable but we had not heard from them since August of the previous year.

So, after that meeting he said he wanted to sit down with us and he led me to believe -- and this was just my understanding, and I can clear that up in a minute -- but at the end of that meeting it was my understanding that when he said commander in chief he was talking about Richard Scrushy, and that we would be sitting down with Richard Scrushy at the next meeting that we would have.

After that meeting I came back and told you all what was going to happen. We talked about if we sat down with Mr. Scrushy at a meeting we would have to get into the status of the case, i.e., that an indictment was, in fact, pending. We had to deal with that issue before we sat down with him. After we talked I received a call from Lewis Gillis and he explained to me that when he said commander in chief he meant Donald Watkins, that he was not talking about Richard Scrushy, and that Richard Scrushy would not be attending the meeting, that this meeting would be attended by the lawyers

and we would talk about how we could resolve this case. So then we had the October 4 meeting. I don't mean to ramble, but that's when we had the October 4 meeting, after those conversations.

Q. Now, it's been testified to on any number of occasions that I was not present at that meeting, do you remember why I did not attend that meeting?

A. Yes, you were on military leave.

Q. All right. Now, would you tell the Court what, if anything, you recall about how that meeting progressed once you sat down to meet?

A. That meeting began like the other meetings we had had with defense counsel where they came in and the first question they would ask is now tell us why you think Mr. Scrushy committed a crime. And someone from the prosecution side would then start going over the facts. We believe that Mr. Scrushy bribed Governor Siegelman for a seat on the CON Board. Why we believed that. The unusual nature in which the IHS check was cut and delivered to Mr. Siegelman.

Q. Was this the same kind of conversation we had with them 15 months earlier?

A. The exact same conversation. It would have been the third time that we had had this conversation because each time we sat down with them they would ask that question. And I don't know if it was because they thought for some reason

the facts had changed since our last meeting, but each and every time we would have to start our meeting with them by going over the facts. In the first meeting you went over the facts. In the second meeting you went over the facts. In the third meeting I think I started going over the facts. I am pretty sure I did. And then I think Mr. Pilger chimed in and may have gone over some of the facts.

Q. So, is it your understanding and belief that Mr. Scrushy and his attorneys were well aware of what the government's position was when they were reinitiating these contacts with us?

MR. LEACH: That calls for a conclusion.

MR. FEAGA: I think their questioning is a conclusion, Your Honor.

THE COURT: Well, it asks him about their mental state, what they knew.

MR. FEAGA: Yes, sir, and I --

THE COURT: Although that's the first objection I have heard to any leading question or any other improper question during this proceeding. Move on.

Q. Well, so when you were agreeing to meet with them what were you expecting to occur during this meeting?

A. All of our meetings with defense counsel in this case had a three-fold purpose, if you will. And the first of which was because they asked for a meeting. And we had told them

and we had decided among ourselves that if any of the Defendants who were targets of this investigation wanted to meet with us and give us evidence that they thought we should consider or try to work some kind of agreement out that we would do that. So because they requested it was the first reason. The second reason was to listen to any information that they had that they thought we ought to consider before we made our decisions or -- about prosecution. And then the third reason was to see if we could work something out. So, that was what was in my mind when we sat down. I thought that what we would get was an attorney proffer from the Defendants. And we did not get that.

Q. Did you get anything other than what you had gotten all along which was a basic denial of guilt?

A. No.

Q. I mean words, things they said, but at the end of the day at each of these meetings they were essentially telling us we were wrong, we wouldn't be able to prove our case and that they weren't guilty of anything; is that right?

A. That's right.

Q. Is that pretty much how we walked out of these meetings?

A. That's how we walked out of the October 4 meeting.

Q. Are you aware of anything that they said during this meeting in any way that helped us prepare our case or get ready for trial or changed our theories in any way?

A. No.
Q. Now, were you present when the conversation took place between Mr. Pilger and Mr. Leach that got heated?
A. I was.
Q. Would you tell the Court what you observed happen about that. And in particular would you address the statement in Mr. Moore's affidavit that Mr. Pilger said to them you have to testify a particular way or we are going to indict you.
A. That's not the way that happened. What happened was, Mr. Leach made a comment that -- and this is in sum and substance, this is not an exact quote -- that his impression of what Mr. Pilger had said to him was, so if my client doesn't testify the way you want him to you are going to indict him. And Mr. Pilger's response was no, your client, if he's going to reach an agreement with us, we expect him to tell the truth. And I am not sure of the exact language, but the way we left it was that he could expect to be indicted if we weren't able to work out some type of agreement as to him.
Q. Now, do you recall a question being posed to you during the October 4th meeting regarding whether or not a charging decision had been made?
A. I do not.
Q. Now, do you recall any question like that being posed to Mr. Pilger or Mr. Pilger responding to any question like that?

A. You know, I think the question was just put out there. I don't think it was directed at me or Mr. Pilger. I think the question, and I don't recall specifically, I just remember them asking, has a charging decision been made. And the answer was no. And I don't remember a lot about it specifically, I just remember the general tone. And the reason I don't remember is because our focus was if we could work out an agreement with one of the targets of the investigation then we needed to kind of shift what we were doing and we needed to make that happen because we were continuing to work on trying to put together a proposed indictment and present it to the special grand jury that was meeting.

Q. This would be the first superseding indictment.

A. That's correct.

Q. That encompassed the much larger offense.

A. That's correct.

Q. The greater number of Defendants.

A. That's correct.

Q. Mr. Franklin, quite frankly the defense in this pleading has challenged your integrity. They have alleged that you deliberately misled them to gain some advantage in responding to a question they made during the series of meetings they had with the government, and I would like for you to tell the Court whether or not you had any intention to mislead anyone

when you met with the defense.
A. I can assure this Court that there was never any intention on my part or any member of the prosecution team to mislead any of these Defendants when we were talking to them. We had as a real possibility to work out an agreement, and we kept the door open at any time that these Defendants called we would answer their call and we would agree to meet with them.

In fact, during the last meeting that we had with defense counsel, which was October the 25th, 2005, we were in the middle of discussing what the proposed indictment would be that we would present to the grand jury on the next day when they called and we had to stop and ask ourselves do we have time to take this call and talk to these guys again, because they haven't given us anything up to this point. And a decision was made based on what we had promised in the beginning, and that is we would keep the door open and we will talk to you. And if you brought forth information that was worthy of working out a resolution of this case, then we would move in that direction. We never got that. We never got in my opinion a serious specific proffer that would warrant us to stop the direction that we were heading in.
Q. Now, the first indictment that was returned on May the 17th, 2005, there's an allegation before the Court that somehow in moving to seal this indictment and in failing to

notify the Court when a part of the reason for that sealing was no longer necessary, that we had some intention to mislead the Court and/or to gain an advantage over Mr. Scrushy through that process. Is there any truth to that allegation?
A. No.
Q. What was the reason for the government sealing that indictment?
A. We sealed the indictment because of the charges that were pending against Mr. Scrushy in Birmingham. And that was consistent with our promise to defense counsel, the promise that we made on July the 8th, 2004. We sealed the indictment because we were continuing our investigation, because the only purpose the original indictment served was to toll the statute of limitations as related to the charges in that indictment, so that we could continue our investigation.
Q. Now, in the earlier meetings we had had with the defense we had talked about the statute of limitations and the fact we had a problem with it, right?
A. In July of 2004 we started telephone conversations back and forth with defense counsel about the statute of limitations and a tolling agreement, and we actually entered into a tolling agreement with defense counsel for Mr. Scrushy and for Defendant Siegelman.
Q. They knew from our conversations the dates that these

payments had been made; is that right?
A. We had given them specific information that indicated the dates we believed that the criminal activity occurred. This IHS -- Integrated Health Services check that was issued on July 19th, and then there is a letter of appointment to the CON Board by the Governor to -- for Richard Scrushy on July the 26th. We told them that we believe the payment was delivered to the Governor during that week. We also had evidence of Mr. Scrushy's calendar that indicated that he was at the lake house that week. So, we theorized that we thought that Mr. Scrushy had possibly driven down from the lake house to meet with the Governor. We didn't know.
Q. We told them we had checked the flight records and couldn't find any flights that he was on.
A. And that was where we started our meeting and that's where we always came back to. We didn't know. Tell us how this could not happen and maybe we will reconsider what we are doing, and they never told us how that could not happen.
Q. Can you remember any case that you have ever been involved with where you gave so much pretrial discovery to the defense, even pre-indictment discovery?
A. I have never given a Defendant pre-indictment discovery, and it was a discussion that you and I had for quite some time as to whether or not we should move in that direction.
Q. Okay. Now, another allegation has been leveled before

this Court that you and the team of prosecutors working with you somehow used the period between the time that the grand jury indictment was sealed, the first one, and then the first superseding indictment was returned to strengthen the case of the government. Would you address that.
A. We put approximately one hundred witnesses in front of the grand jury.
THE COURT: Which grand jury? At which time?
THE WITNESS: The special grand jury. Between June the 21st of 2004 and October 4 of 2005.
THE COURT: Prior to the first indictment?
THE WITNESS: No, it's prior to the first superseding -- the superseding indictment.
MR. FEAGA: Your Honor, I might be able to help the Court. I am going to ask Mr. Franklin if he will to examine --
A. Can I finish my statement?
Q. Yes.
A. There were -- of those hundred witnesses that were placed in front of the grand jury there were four witnesses, and I am not -- the hundred is just a ballpark figure. There were only four witnesses placed in front of the grand jury after the October 4 meeting.
MR. FEAGA: Your Honor, I would like to if I may approach the witness.

THE COURT: You may.
Q. Mr. Franklin, you recall me asking your secretary, Ms. Shaw, to pull down a list of the people that were placed before the grand jury after the first indictment was returned?
A. I do.
Q. And do you recall me showing that to you and discussing it with you this morning? I would like to show you what has been marked as Government's Exhibit 1 for identification purposes.
MR. FEAGA: I am not offering it, Your Honor.
Q. The grand jury testimony has been turned over to the defense but I would like to ask you to examine that, Mr. Franklin. And if you could, would you tell the Court how many witnesses we subpoenaed to the grand jury after the first indictment was returned but before the meeting with them on October the 4th?
A. If you will give me a minute to count it up, they are not numbered.
Q. Yes, sir.
A. There were -- according to what you put in front of me there were 30 witnesses summoned to the grand jury between May the 17th and October the 4th of 2005.
Q. Okay. And I want you to look if you would to the date -- the meeting date of the grand jury that occurred closest to

the October 4th meeting but prior to it, that being September the 28th.
A. I am there.
Q. I would like you to look at the first four names on that list and if you would tell the Court if you recognize those names and what the government was eliciting at that time six days before we had any meeting with Mr. Leach.
A. Is it just the four? Just the four?
Q. Just the first four is all I am asking you about right now.
A. The first four were members of the CON Board who had been appointed to the CON Board by Governor Siegelman, then Governor Siegelman.
Q. And if you would, do you know why we were calling members of the CON Board to the grand jury at that point in time?
A. Sure. We wanted to ask the members of the CON Board about their understanding of what it meant to -- what a recusal was and under what circumstances they would recuse themselves from a matter pending before the CON Board.
Q. Okay. And did that relate to a specific matter that we were investigating with the grand jury at that time?
A. It did. We had worked on what we -- what has been referred to here as the Adams piece. We knew that Mr. Adams had appeared before the CON Board after he had signed a

contract to work for HealthSouth, and he had not disclosed to the other members of the CON Board that he was employed by HealthSouth, or that he had been employed by HealthSouth to work on a particular matter, and that he had been meeting with the CON Board on at least two instances to make a quorum, where if he had not been there the CON Board could not have conducted any business on that day, or those days.

Q. After we met with defense counsel, Derrell Fanchard, a Carlton McCurry and Loree Skelton testified, amongst three of the last four witnesses to appear before the grand jury, and those four, the only four after the meeting with Mr. Leach. Do you recognize those three names?

A. I do.

Q. Now, there's one other person that appeared after we met with Mr. Leach, that would be Lanny Young.

A. I recognize that name too.

Q. Do you have any recollection of Lanny Young being called to testify about anything that you talked to Mr. Leach about or that his client was indicted for or that you were thinking about indicting his client for?

A. No. Mr. Young's testimony did not relate to any matters involving the CON Board.

Q. These other three people, Derrell Fanchard, Carlton McCurry, Loree Skelton, you heard Mr. Pilger testify about why we called them.

A. I did.
Q. Do you have any disagreement with him about why the government called those people to the grand jury?
A. No.
Q. Did we use to your knowledge any information provided to us by Mr. Leach -- did we use any information provided to us by Mr. Leach in any meeting that you had to your knowledge in any way to further or develop a case against his client?
A. We did not. We used the information that had been gathered before our meeting with attorney Leach to continue the investigation that we had started. And just so I put it in context, although we would stop and take the time to meet with defense counsel, we continued to investigate and work on -- or work towards a superseding indictment that we could agree on with the partners who were working with us. We continued to do that. We would just stop and meet with defense counsel whenever they requested a meeting.
Q. Now, you heard Mr. Pilger get a lot of questions about why we felt a need to maintain secrecy about what we were doing, do you remember those questions?
A. I do.
Q. I would like to ask you if you recall having any concerns about what you were hearing about the publicity that Mr. Scrushy was generating before and/or during his trial up in Birmingham. Did that cause you any concern in terms of how

he might react to any charges that were brought against him down here?
A. It did.
Q. What was the concern, Mr. Franklin?
A. The concern was that there would be contact with witnesses and the concern was that there would be public statements about what was going on. So we did not want that to happen in this case.
Q. Why were you concerned about Mr. Scrushy perhaps making public statements about things that might be revealed to his counsel by you?
A. We knew that Mr. Scrushy had a regular TV -- a program on TV that he regularly appeared on. We did not monitor the television shows, but we knew that it existed. We knew that at some point -- and just as I was sitting here listening to Mr. Pilger testify I remember that when we went to interview Swaid Swaid about the Tim Adams piece that he had been contacted by Mr. Scrushy's attorneys and by attorneys representing Loree Skelton. At the time that he had been contacted there was no agreement with our office and Loree Skelton so we were concerned at least about that contact. That's just the first one that comes to mind.
Q. Tell the Court who Swaid Swaid is and how he fit into our continuing investigation.
A. Swaid Swaid was a doctor who worked for HealthSouth.

That's my understanding. And at some point Loree Skelton had called Swaid Swaid and told him that Richard Scrushy wanted Swaid Swaid to interview Tim Adams. That Tim Adams was under the belief that he would be given some kind of executive position at the hospital where Mr. Swaid Swaid worked or Doctor Swaid Swaid worked, and that was what we believed was part of the corruption of Tim Adams during the time that he was a member of the CON Board.

Q. Okay. And so having heard from Swaid Swaid that he had been contacted by attorneys for Loree Skelton and/or Richard Scrushy, are you telling the Court that that's an indicator to you of one of the reasons why you would want to maintain as much secrecy as you could about what we were doing?

A. That's correct.

Q. Mr. Franklin, in his original pleading alleging these allegations or making these allegations of dishonesty and deception against the United States government Mr. Leach makes the statement that he asked at the October the 4th meeting if the government would let Mr. Scrushy testify before the grand jury and tell his story to the grand jurors. Do you remember any statement like that being made?

A. I don't recall the statement. I do remember that when this issue was raised and having a sit-down with my co-counsel to talk about it, they recall that in response to a question, they think I said no charging decision had been

made.
Q. Let me ask you, there's an affidavit attached to it that he references as a source for that. Do you remember reading this pleading, the pleading that Mr. Scrushy filed where he alleged government misconduct in the prosecution of this case?
A. I have read it, yes.
Q. Isn't it true that on page three, paragraph ten, that he refers to as a source for the statement that he gives to the Court in the pleading, that what, in fact, is said by his co-counsel is that he asked the government to call Mr. Scrushy and compel his testimony. Now, how long have you been an Assistant United States Attorney?
A. A little over 14 years.
Q. Is there a difference between asking the government to call a witness through compulsion to come to the grand jury and offering to have your client come and tell his side of the story to the grand jury?
A. Yes.
Q. Would you say there's a significant difference between those two?
A. There is a significant difference because as to the compelling a witness before the grand jury you have to get permission from Washington, D.C. to do that.
MR. FEAGA: Tender the witness, Your Honor.

THE COURT: All right. Let's take a recess until 4:00 o'clock.

(At which time, 3:45 p.m., a recess was had until 4:00 p.m., at which time the hearing continued.)

THE COURT: Proceed with the cross-examination.

CROSS-EXAMINATION

BY MR. HELMSING:

Q. Mr. Franklin, you were present when Les Moore testified today, were you not?

A. I was, Mr. Helmsing.

Q. Yeah. And y'all have worked together, you heard him recount your experience of working together over the past, I don't know how many years, but number of years, when he was a law enforcement officer; do you recall that?

A. That's correct.

Q. And he brought cases to you and you prosecuted those cases, you had a close relationship, didn't you?

A. We did.

Q. And do you consider him an honorable person?

A. I do.

Q. And truthful?

A. Yes.

Q. Now, let me just ask you this, as to this October the 4th meeting, however you want to phrase it, or whatever words were used, there's no doubt in your mind that an inquiry was

made by the lawyers representing Mr. Scrushy as to the status of the proceeding against Mr. Scrushy, if any in this case; isn't that true?
A. I wouldn't describe it like that. I, in my mind, an inquiry was being made as to what we intended to do with Mr. Scrushy, not the status of the case. And it's very important to me if what was asked is has my client been indicted as opposed to have you made a decision. That's a difference to me because we were talking about a decision and the decision that we were contemplating was are we in a position to make an agreement with Mr. Scrushy. And we were not at that time. And we also had not decided what the final form of the proposed superseding indictment would be at that time.
Q. But there was an inquiry, whether it was -- maybe that was a poor choice of words on my part to say the status of the proceeding, but there was an inquiry made as to what the government was going to do with Mr. Scrushy and where that was in the process, wasn't it?
A. There was an inquiry, yes.
Q. And neither you nor anybody else in that meeting said wait, you have been indicted, already there's an indictment against you.
A. Of course we didn't say that, the indictment was under seal. We couldn't say that.
Q. Was there any discussion about going to the Judge and

getting the seal lifted so you could tell the Defendant that he had been indicted?
A. Not at that time. There was not a specific enough proffer placed before us that would warrant us going to the Judge and asking him for a limited unsealing of the indictment. We just didn't -- and I think that's what the problem has been throughout this process. I don't know what Mr. Leach was thinking when he came to us, I can't tell you that. All I can tell you is that in my mind in order for us to start talking about a sealed pleading we would have had to get a lot closer than where we were, i.e., a specific proffer. We never got a specific proffer. What we got was some information with a caveat in front of it or at the end, I don't want you to hold me to this, I don't want you to hold my client to that. And I think that's where the disconnect comes in. We never got an attorney proffer and we never sat down with Mr. Scrushy himself to get the actual facts of what he would say if asked questions about what happened. We just did not get that close.
Q. I understand that, but I think that this proceeding at least is concerned with what the -- Mr. Scrushy's counsel understood from that meeting and prior conversations but certainly from that October 4th meeting as to what was the current status of things. I use that word status, but the current situation with regard Mr. Scrushy. And one of the

things they wanted to know was whether a charging -- whether you use the word charging decision or an indictment had been returned or they had made a decision on what to do, and nobody told him at that point you have been already indicted.
A. You are correct, no one told him he had been indicted. But I am not sure where they were, all I can tell you is what our intent was when we talked to them, and it was never our intent to mislead them.

MR. HELMSING: That's all we have. Thank you very much, Mr. Franklin.

THE COURT: Anything else from this witness?

MR. FEAGA: Not from the United States, Your Honor.

THE COURT: Thank you, Mr. Franklin. Anything else from the United States?

MR. FEAGA: No, sir, Your Honor.

THE COURT: All right. Gentlemen, I will hear your argument. Oh, I have one question. Mr. Franklin, you can answer it from down there. Of the four witnesses who testified before the grand jury after the meeting on October the 4th, other than Ms. Skelton had any of those witnesses previously given testimony to the grand jury?

MR. FRANKLIN: Judge, I believe, and I am not sure, the one CON Board member who testified, I think his name was Mr. -- if you will give me --

THE COURT: There was Skelton, McCurry --

MR. FRANKLIN: Mr. McCurry. He may have testified before. There was a scheduling problem with respect to him, he was supposed to testify before that meeting of the grand jury and we had to rearrange our schedule to get him to the grand jury when -- you know, when he was available. So I don't know if he testified before back in July of 2004 because we did bring the CON Board members in early on and put them in front of the grand jury. So he may have. I know that Mr. Fanchard did not.

THE COURT: Mr. Leach?

MR. LEACH: Judge, it would be my intent not to spend a lot of time in terms of arguing the case to the Court. I just want to point out to you that I think and hope --

THE COURT: I have read the briefs, I have read most of the cases you cite.

MR. LEACH: Okay. And I guess the biggest thing there's been confusion today, number one, over our first argument everything to do with the pretext and the sealing. You know, we are not saying that it was improper for the government to come to you. And we are not saying that that period of time while Richard Scrushy was on trial --

THE COURT: What you are really arguing about it, if I can characterize it so that that will help you understand if I understand it, what you are really saying is that at

some point the government began to use the grand jury for the improper purpose of continuing the investigation against your client with regard to the charges that were contained in the first indictment.

MR. LEACH: That's correct.

THE COURT: The original indictment. And that's what I have understood your argument to be.

MR. LEACH: And I hope that you will look at the cases that are cited in our reply brief, Judge, and I hope you will examine the testimony, you have indicated that you would. Obviously where you need to focus on is on Loree Skelton, and I think when you look at her, at her testimony, I think what you are going to see is that her testimony is a change on the critical points.

THE COURT: With regard to her, you have asked the Court to dismiss the indictment against your client, but if the Court were to find that you were prejudiced by improper conduct on the part of the government, if it were improper, wouldn't the proper remedy simply be to bar Skelton's testimony at the trial of this case?

MR. LEACH: Well, Judge, obviously the case law always speaks that that is -- dismissal is the most extreme --

THE COURT: Extreme.

MR. LEACH: -- extreme remedy and if the Court can

carve out a remedy further down the line that the Court ought to do that if it can meet the remedial purposes and so forth of what is there. And I will readily admit to Your Honor that you may be able to find other remedial ways of dealing with what is before the Court. The biggest thing that we have trouble with is the fact that this investigation continues, and yes, there's other Defendants, and yes, there are other charges. But at the end of the day what the government has done is they have taken that 371 conspiracy that was initially charged and they dismissed that, and that's why I had Mr. -- counsel look at that dismissal. The net effect of that dismissal, Judge, was only to get rid of the conspiracy charge so that they could come back in the third indictment and represent that conspiracy charge.

THE COURT: Well, how do I make a decision between whether the government was using the grand jury to continue or to conduct discovery? It's hard -- it's a little hard to talk about this, because certainly the government may use the grand jury to continue investing crimes.

MR. LEACH: Yes, sir.

THE COURT: What seems to be improper is continued investigation about a crime already charged if that continued investigation amounts to discovery, amounts to trying to, as you have used the phrase, shore up their case. How do I decide between what is a legitimate use and what is not a

legitimate use of the grand jury, based on the facts of this case, not some hypothetical abstract?

MR. LEACH: The only way I know to do it based on the cases I have cited in my brief here, Judge, is you have got to look at the core facts in the case and see if these charges, as you go through the progression, first indictment, second indictment, third indictment, are the core facts changing. And I think what you will find when you look at Loree Skelton's testimony is that her first testimony in front of the grand jury was unacceptable. And the difference between some of these cases that you are looking at, like I think I mentioned Beasley earlier on, is the fact that in that case the government actually goes to the witness and says we are having great difficulty with your testimony and we are contemplating a perjury charge or an obstruction, I can't remember the precise charge, whatever it was we are contemplating this, and if you want to come back and pursuant to the statute recant your testimony and fix it, we will permit you that opportunity to do that. If you will look in that Loree Skelton testimony, Judge, and you will find nothing like that. What is happening in that Loree Skelton testimony I would suggest to Your Honor is that they are locking Loree Skelton down to their theory of the case.

THE COURT: Well, my problem with that articulation, I understand what you are arguing, but when I compare it with

the case law in the cases where the Court has had an abiding concern about the government's treatment of witnesses, they have been defense witnesses, they have not just been general witnesses. If you look generally at the cases you cite, they have been witnesses who already were clearly going to testify for the defense. Clearly were important to the defense. Skelton doesn't strike me -- and I have not read her testimony, I have only heard what has been said about her and what has been written about her -- she doesn't strike me as a defense witness in that sense.

MR. LEACH: I think she is, Judge. I think she ought to be. I think that what happened -- and maybe I guess what we are doing is we are inching up on really the issue here. What should have happened is that Loree Skelton's testimony when you read the first grand jury transcript you are going to come away with the impression that was favorable for Richard Scrushy. And when you come away from the second transcript you are going to come away with the impression she is a witness now against Richard Scrushy. So that's perhaps the nut of the problem right there.

THE COURT: All right.

MR. LEACH: In terms of informing you about the reasons for the seal, the issue has been really misconstrued throughout the course of this hearing. I don't really have a lot of heartburn with the fact that the indictment was

sealed. Obviously that was appropriate and the reasons were right. I don't have a lot of heartburn that they were continuing their investigation even after Richard Scrushy's acquittal and that they were going forward. I heard them articulate their reasons for that and their concerns. I have got issues with those concerns obviously but I understand them. I have been in those shoes and I can see why they would want to have that shroud over their case and have no problems with it.

What I do have a problem with is where that intersects with the meeting we are having, and at that point I would suggest to Your Honor that we were so far down the road and so close to the indictment, and the fact that you have testimony from the government that this was actually discussed, in other words it was discussed as to what are we going to do about the seal, how are we going to manage this, and then when I come in and ask those questions close in time to when those discussions are taking place, it's clear where I'm going. All right. And what counsel elects to do --

THE COURT: But I don't think it was clear.

MR. LEACH: You don't think it was clear?

THE COURT: I don't think it was clear at all. And at least from what the prosecution has said, unless I were to simply disbelieve them, they didn't understand it that way. But it strikes me that there's a contextual issue here that

has been alluded to but glossed over, and that is what was going on was you were trying to get your client out of trouble, they were trying to get your client to come to some agreement. And those two things don't necessarily mean the same thing, especially in this context. So, I understand your argument. I understand your argument perfectly. You asked them what you thought was a straight-forward question, but as Mr. Pilger said, I understood it entirely differently. Now, whether that's disingenuous or not is quite another question. Does the phrase charging decision have any special meaning to prosecutors? Is it a term of art used in the U.S. Attorney's manual?

MR. LEACH: Not in the U.S. Attorney's manual but it's used frequently between prosecutors. Charging decision, for instance when you are doing a RICO prosecution memo, you have to send it off to the Department of Justice and they make a prosecution decision, they give you the thumbs up or thumbs down.

THE COURT: I understand. Now almost every decision has to be approved in Washington these days.

MR. LEACH: I don't think the counts against Mr. Scrushy had to be approved. Even though public integrity is involved, Judge, I think the local office could have made those decisions all by themselves and that's why I'm asking those prosecutors --

THE COURT: But charging decision doesn't mean indictment. It could. It could lead to that but it's not synonymous with it.

MR. LEACH: Absolutely. I agree. And that's where I was. I was looking for state of mind, Judge. In other words is your state of mind today that Richard Scrushy is going to be indicted. I honestly, and the people that were with me, we did not imagine that the indictment was sitting there in the clerk's office.

THE COURT: Why didn't you just ask them whether he had been indicted or not?

MR. LEACH: It didn't dawn on me. I didn't think that would happen. You have to remember my testimony, Judge, and that was I thought with Lowell and all those meetings prior, that that issue had been resolved and now I am hearing that it has resurfaced and I -- you know, when I asked about the statute of limitations issue that's what I am going at. In other words, how are you dealing with that statute of limitations. I am told that it is not a problem. My thought process there is, they have found some other overt act or they are going after a RICO where they get an extended statute, there's something else that's going on here.

THE COURT: Well, I understand your position. Tell me where the prejudice is.

MR. LEACH: Tell you what the prejudice is?

THE COURT: Where the prejudice is, recalling that we are in open session now.

MR. LEACH: The prejudice in my view is to go from the proffer, in which we discussed details -- I know the government is telling you they got no details, but there were details discussed. And what happened was our defense was discussed, issues were highlighted. And it is my suggestion to you that when you see Loree Skelton's testimony the things that they are trying to lock her down on directly relate to Richard Scrushy's defense. Nick Bailey, you know, I can't speak to. I tried to probe in that a little bit in terms of whether Nick Bailey has since retreated from the proposition that the check was delivered on the first meeting. That came from us, Judge. I don't think there's any testimony to contradict the fact that Richard Scrushy's proffer was there was no check in the first meeting, that that is simply a, you know, meet and greet and try to bury the hatchet and come to some understanding about life.

THE COURT: And the government's position is there was a check.

MR. LEACH: Yes, initially. But I suspect that at the present time Mr. Bailey has moved, only because Mr. Bailey has moved on so much.

THE COURT: All right.

MR. LEACH: That that would be prejudicial to us.

And I think the Loree Skelton changes and the lock-down of Loree Skelton's testimony where she goes from being favorable to Richard Scrushy to being very unfavorable to Richard Scrushy on several different points, I think you will find three different points in there having to do with Tim Adams, having to do with the two hundred 50 thousand dollar check. And there's two points on Tim Adams and one having to do with the two hundred 50 thousand dollar check, and the fact that initially she says I would have no knowledge and it wouldn't be unusual.

THE COURT: But it's prejudicial to you only if the government would not have pursued that line of inquiry before the grand jury. In other words, but for what you did at the October 4 meeting the government would not have been able to present Skelton's second round of testimony before the grand jury.

MR. LEACH: That's the prejudice end of it but it's also wrong in that they shouldn't be putting Loree Skelton back in front of the grand jury because there is -- you know, they already had her testimony in, that testimony relates to an aspect that's already indicted and they are just including --

THE COURT: But there's testimony before the Court, and I will have to make a judgment about whether it's different or not, but that the Adams matter, which the

government has characterized and I won't try to do it myself, was different from everything else, and that that's what they were pursuing. Why is it not different?

MR. LEACH: You also have testimony that that information was included in the second indictment as part of the mail fraud. And what normally happens, Judge, is when information is presented to the grand jury and an indictment is returned on those facts, you can always go back to the grand jury, you can always go back and supersede and add new counts or present a small body of evidence and add a new count or something like that. Here what they are doing is that count, those facts, are in front of the grand jury and yet they put Loree Skelton back in front of the grand jury in December and lock her down further and then present the indictment. In that regard, you know, I am arguing to the Court that what is happening here is these additional counts are just a cover. In other words, the conspiracy count was already there, the mail fraud count goes in and the conspiracy count drops with the government dismissing it and then they turn around and put the conspiracy count right back in but they are incorporating things that were already in the second indictment. Why does Loree Skelton have to go back in front of the grand jury? She does not. All they did was lock her down.

THE COURT: All right.

MR. LEACH: And then my final argument we have already discussed, Judge, with regard to the, you know, misrepresentations.

THE COURT: Yeah, I understand that.

MR. LEACH: Thank you, Judge.

THE COURT: I will hear from the government.

MR. FRIEDMAN: Your Honor, I am Richard Friedman, I am with the appellate section of the criminal division. Thank you for the opportunity of appearing here.

THE COURT: Good to have you with us, Mr. Friedman.

MR. FRIEDMAN: I think it is agreed among the parties that for the Defendants to prevail in this motion they must show all of three things: First, they must show government misconduct, but more than government misconduct, they must show intentional, flagrant, egregious government misconduct. I will get into why they haven't even shown misconduct, but they certainly haven't reached the much higher standard. Second, they must show prejudice. And as Your Honor's questions have indicated, there are two prongs to the prejudice. They have to show a causation between the misconduct and what they claim is injury. And then they also have to show real and substantial prejudice, not merely an allegation or a hypothetical. And third, they have must show that the remedy they seek, dismissal of the indictment, is the appropriate remedy to cure prejudice caused by egregious

government misconduct. Before I go into any of this I would like to first address any questions Your Honor has.

THE COURT: Let's talk about the misconduct. Were I to conclude that lying to your opposing counsel occurred, isn't that flagrant misconduct? I mean every rule of professional conduct, the American College of Trial Lawyers trial conduct standards say lawyers have a duty and candor to the tribunal and a duty of fairness to opposing counsel. And lawyers ought not lie to each other.

MR. FRIEDMAN: Lawyers certainly ought not lie to each other, but on this record, Your Honor, we submit you can not possibly find as a fact that there was any kind of intentional, wilful lie.

THE COURT: Well, if lawyers have a duty not to lie they also have a duty it strikes me, and you can argue with me about this, don't they, to insure that there's no misrepresentation?

MR. FRIEDMAN: There was no misrepresentation here in the context. And if you will permit me. We know that there was some question about the status of the charging decision. We also know that it was never asked has my client been indicted. We know that the government effectively communicated to the defense that the government was in a position with respect to its charging decision to have a meaningful and frank discussion about a cooperation

agreement. We know that the government did not disclose that Mr. Scrushy had been indicted and we know that was proper not to disclose it.

Now, we talked about terms. Indictment. Charging. Prosecution. And I think it may be telling as to how these terms can have different meanings in different contexts. That when Mr. Pilger was on the stand and Mr. Leach was questioning him, he asked him, we were discussing a cooperation agreement whereby Mr. Scrushy were to get a pass, and doesn't a pass mean that he won't be prosecuted? But earlier he testified that his thinking was a pass means he won't be indicted. But we can see that these terms can mean different things depending on how they came up.

And we think in that context it is certainly reasonable that the government would understand the question about the charging decision to be a question about has the government decided whether they are going to prosecute my client. Is there any point to having this discussion about a cooperation agreement? And the government answer, communicated effectively, we are interested in a cooperation agreement. And, of course, the government couldn't tell them you have been indicted.

THE COURT: Let me frame my question this way: In the sterile crucible of this courtroom or in appellate courtrooms we are very fine with making these elaborate

arguments, but in the real world of negotiation lawyers become emotional, they get heated in their discussions, as obviously happened in this case. And yet when we step back from that we know that that very kind of situation can lead to misunderstanding, can breed misunderstanding, and indeed is the reason for much misunderstanding. Don't prosecutors have a special duty under these kinds of circumstances, or is -- for the prosecution or are they just part of the rough and tumble adversarial system?

MR. FRIEDMAN: If the prosecutor had understood that there was a misunderstanding then the prosecutor could have acted to correct it. But the prosecutor's understanding we think was the same as what the testimony here was about the --

THE COURT: Oh, come on. When someone says has a charging decision been made and you look at them and say no, you have got to believe that that question has some kind of direct import. I mean if you are thinking well, no final decision has been made --

MR. FRIEDMAN: Perhaps you didn't understand where my sentence was leading. The testimony of Mr. Leach was that whether it was prior to indictment or after indictment, he would still have the same discussions with the government and he would still make the same proffer in order to avoid his client being prosecuted. It's completely reasonable, as was

testified, that the government attorneys at this meeting when they were asked about the status of the charging decision, they did not understand that there was any distinction in the defense mind between pre-indictment cooperation discussions and post-indictment cooperation discussions. There never was any mention of that. Giving good faith on both sides, there was a misunderstanding. But misunderstanding does not mean misconduct. Nor was there any indication by defense counsels' actions or statements that would alert the government that there was even a misunderstanding.

THE COURT: So your position basically is if there were a misunderstanding that still doesn't rise to the level of the kind of misconduct that would necessitate the Court taking any adverse action against the government; is that fair?

MR. FRIEDMAN: Exactly.

THE COURT: All right.

MR. FRIEDMAN: Let me speak briefly about prejudice on the two prongs I mentioned. One is causation, and I have just touched on this. We have testimony that the same proffer would have been made, the same discussions, the same meetings, even if defense counsel had been told as they know now that they had been indicted. So where is the causation between the alleged government misconduct, which was in the allegation of allowing a misunderstanding that he hadn't been

indicted, where is the causation between that and the proffer? Since we have testimony that even if he had known he had been indicted the proffer would get made. No causation.

The second is where is the actual substantial prejudice? Where is the prejudice that affects the indictment? There could be no prejudice to the indictment on the bribery charges, because he had been indicted on bribery in May. There could be no prejudice on the expansion of the indictment to include a bribe for appointing Mr. Carman, the successor of Mr. Scrushy on the board, because nothing they revealed had anything to do with that aspect of the bribery. There can be no prejudice as to the ultimate superseding conspiracy charge to corrupt Mr. Adams on the board because nothing they revealed dealt with that. Since there was no prejudice relating to the indictment, dismissal of the indictment is entirely inappropriate.

The Supreme Court's case in Morrison makes it very plain on two points. First, you have to show that the misconduct, once demonstrated, caused prejudice in the indictment. And the second thing, which is perhaps quite important in footnote two of that opinion, the Supreme Court made it clear that just because there may be no other remedy doesn't mean that you get dismissal of the indictment. If there was misconduct there are remedies against attorneys who engage in misconduct, but the people's interest in effective

prosecution of a criminal case requires that the Defendant does not get a remedy unless he shows his prejudice.

THE COURT: But essentially that's a remedial argument. And in many respects I tend to agree with you about prejudice relating to the indictment, but there's also the aspect of the prejudice relating to the Defendant. If I were to conclude that with regard to Skelton -- and on this issue I frankly am in the dark because I have not read Skelton's testimony, and I will -- but on that particular issue if I were to find there were misconduct regarding Skelton wouldn't the proper remedy be to simply bar her testimony?

MR. FRIEDMAN: If I may make a procedural suggestion. This case has been advanced to the Court as a motion to dismiss the indictment.

THE COURT: It has.

MR. FRIEDMAN: If there's a motion to suppress testimony we suggest that that motion be made and be briefed, because as you have gathered from our side, we believe very strongly that we can marshal evidence from previous grand jury testimony and other testimony to show that the Skelton testimony was not the product of anything that was said at the meeting.

THE COURT: And I gather that.

MR. FRIEDMAN: Okay. So we would oppose the Court

approaching this as well, perhaps an indictment dismissal is an inappropriate remedy for their dismissal motion but perhaps a suppression of testimony, if that's what they are asking for, we think there needs to be at least briefing on the question of whether there's any basis to suppress the Skelton testimony.

THE COURT: Well, and I will tell you how I am going to proceed. I am going to look at Skelton's testimony because I am going to order the government to provide it to me, and also look at some other matters that will be clear from the order that I will enter requiring the government to provide the Court with information about the grand jury process. And then if I were to need to proceed from there I may very well seek additional briefing or argument about it.

MR. FRIEDMAN: Thank you, Your Honor. On the question of the sealing of the indictment, if Your Honor would like me to speak to that. And also the slightly separate question, but somewhat entangled question of misuse of the grand jury. Now --

THE COURT: Let me interrupt you. The sealing issue I think is in large measure unimportant. It's not one about which I have a great deal of heartburn. Both the original reasons it seems to me struck me were legitimate. They were -- remain legitimate. I think the core of the question is whether because of excessive sealing, shall we say, the

grand jury process was misused, and that's quite another matter, so address yourself to that.

MR. FRIEDMAN: If I understand Your Honor you are asking to address the sealing after the acquittal?

THE COURT: Yes. And the consequences of that, the use of the grand jury for improper investigation.

MR. FRIEDMAN: We don't think that there's any dispute that it is a proper reason to seal an indictment that the government has an ongoing investigation, and the case law has never required --

THE COURT: That's correct.

MR. FRIEDMAN: -- and the case law has never required the government to make a particularized showing that in the specific case they are worried about these documents being destroyed or that witness being corrupted or that witness absconding. It is the general concern that applies in every ongoing investigation. There is as Your Honor knows no requirement either in the case law or in a local rule of this Court for the government to come back to the Magistrate and ask for an additional sealing order if there's some evolution in its original causes for sealing. The procedure is what is going on here, where in hindsight one evaluates the reasons for sealing and if they are proper reasons for sealing then the indictment is found to have been properly sealed.

Now, was there a misuse of the grand jury process,

either during the sealing period or even after the unsealing? Your Honor asked opposing counsel how do you tell, and the case law has provided some standards. The Alfred case from the 11th Circuit requires a strong showing by the objecting Defendant that the primary purpose of the grand jury was to strengthen the government's case. There's been nothing even close to that. It is absolutely permissible that the government may get ancillary benefits in strengthening its case. But as the First Circuit, we think it's a powerful precedent, though not binding on this Court, in the Flemming case, where there have been additional charges against a Defendant in the original indictment, when there has been the addition of new Defendants, it conclusively shows that the indictment was primarily used -- the grand jury process was primarily used for a proper purpose.

THE COURT: I am always concerned about conclusive presumptions, they strike me as something which the Supreme Court, for example, has never had a great deal of fondness for, especially of late. But take the argument that Mr. Leach makes, you had 371 in the original indictment, and it's not much different in the last indictment.

MR. FRIEDMAN: If I may submit, Your Honor --

THE COURT: And yet it disappeared.

MR. FRIEDMAN: -- there are significant differences that have been touched on and see if I can articulate them

well. In the original indictment both the substantive and conspiracy counts were about a bribery between two individuals, Mr. Scrushy bribing Governor Siegelman to put Mr. Scrushy on the CON Board. In the superseding indictment, the first superseding indictment there was an additional allegation of wrong doing contained in the mail fraud count, and that was in addition to the bribe being paid to put Mr. Scrushy on the CON Board. The bribe was also paid to put Mr. Scrushy's successor on the CON Board, which was Mr. Carman. Then in the second superseding indictment there was a third aspect of wrong doing, and that was with Mr. Scrushy misusing his position on the CON Board to corrupt a fellow CON Board member, Mr. Adams, and thereby in effect get two votes in favor of Mr. Scrushy's private agenda. So these are -- this is an evolution that includes different charges of wrong doing. So even if Your Honor just looked at Mr. Scrushy's charges we think you would find that there was a sufficient evolution in the nature and severity of the charges as the grand jury proceeding continued that even as to him alone the grand jury was properly used to bring additional new charges.

But you don't look at Mr. Scrushy alone. He had a co-Defendant, Governor Siegelman, who was in the original indictment. And there's no dispute that there were hugely different, more complex and more serious charges brought against him in the superseding indictment. And therefore

it's clear the primary purpose -- primary purpose of the grand jury proceeding was a proper purpose.

There has been some suggestion that well, maybe there was something alternative that could have been done at some point partially unsealing the indictment or not disclosing the text of the indictment but the fact of the indictment. We think the Edwards case from the 11th Circuit answers that. At page 649 of 777 F.2d, the Court rejects the argument that there might have been other alternatives that could have been considered to the total sealing of the indictment. The fact that there are other alternatives does not mean that the sealing was improper. Does Your Honor have additional questions?

THE COURT: No, thank you. Mr. Leach, I want to hear a little bit more about your argument about the indictments, if you will. The government certainly has a good point about the additional charges, and I want to make certain I understand your position about that. I mean over the course of the indictments they did change, there were added charges. And I think you have to talk about the indictment as a whole, not just as related to your client. And I guess in base what I am really searching for is how do I determine whether continuing investigation was improper or merely an incidental benefit?

MR. LEACH: Your Honor, you know, in most cases,

Judge, it's very confusing because what happens is you have got the same core of Defendants and they are charged with narcotics here and then they are charged with money laundering in the second. That's not what happened here. What you have got is you have got seven schemes that are charged, and nobody contests the fact Mr. Scrushy only has to do with the one scheme. So all these additional Defendants and schemes that are added, in this situation, don't cloud the mix where they normally do. And that's usually where the Court is going to put its foot down and say well, you know you have got this conspiracy of five people and all the same five people are now charged with money laundering or tax evasion or whatever the heck happens.

That's not what happens here. What happens here is you have got this core set of facts, the same set of facts that the government had in their possession going back into May when the first indictment was presented. Mr. Pilger told you that as of the second indictment they have got this stuff about Tim Adams. All right. And they present their second indictment. Now they come down to the third indictment and they have still got Loree Skelton in front of the grand jury and she is talking about the two hundred 50 thousand dollars that they had when they presented the first indictment. And therein lies the problem.

Mr. Friedman, I guess the government in general

wants to tell you -- not just the witnesses but also counsel wants to tell you that that is incidental to the investigation. The problem that I have got with that, Judge, is that you look at Loree Skelton's testimony what you are going to see is they gave her -- she went in front of the grand jury and gave testimony on those topics. All right. There's nothing in that grand jury testimony that says Skelton, you are here today because we are investigating a potential obstruction of justice, or potential perjury.

Loree Skelton is in front of the grand jury as a cooperating witness with the government. All right. There were discussions with Ms. Skelton's counsel about the possibility that she could be indicted. And now she is in front of the grand jury and she is cooperating with the grand jury and she is locked down on issues that go all the way back to the first indictment of May of, what was it, '05.

So therein lies the problem. You know, not that you have got the much broader investigation and schemes are being added and eventually a RICO was added and so forth, that has nothing to do with Richard Scrushy. He wasn't charged in the RICO. He didn't end up in those counts.

And the problem that I see for the government in terms of discovery in front of the grand jury is that these things are not incidental. Loree Skelton and that two hundred 50 thousand dollar check has nothing to do with the

other six schemes in that indictment. It has nothing to do with anything except the government's original theory of prosecution, having to do with the 666 counts and whether or not Richard Scrushy was either bribing or aiding and abetting in the governor doing something that was illegal. That's the problem.

THE COURT: All right.

MR. LEACH: Thank you, Judge.

THE COURT: Mr. Franklin, I am going to order the government to provide to the Court copies of Ms. Skelton's testimony before the grand jury, and, in fact, the testimony of the four witnesses before the grand jury after the meeting on October the 4th. I also want a list of -- or copies of any subpoenas that were issued after that meeting. And I also want copies of any reports of interviews with Ms. Skelton by any police authorities that you have in your possession. I will put all that in an order but I wanted to advise you of it now so you could begin to gather that material because I want it by next Monday.

MR. FRANKLIN: Yes, Your Honor.

THE COURT: Anything further?

MR. LEACH: No, sir. Thank you for hearing us.

THE COURT: Thank you. We will be in recess.

(At which time, 4:43 p.m., the hearing was adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. This the 21st day of March, 2005.

Official Court Reporter

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APRIL 14, 2008

Chairman John Conyers
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Delivered Via U.S. Mail and E-Mail to: Sam.Sokol@mail.house.gov

Re: United States v. Siegelman and Scrushy

Dear Chairman Conyers:

This letter relates to events beginning in 2004 regarding to the prosecution of Governor Siegelman and Richard Scrushy in Montgomery, Alabama. I represented Richard Scrushy during that prosecution and I continue to represent him to this day.

I represented Richard Scrushy from the very outset of the events that lead to the indictment and prosecution in Montgomery. I was not directly involved in the conversations and meetings in 2004 with the Montgomery United States Attorneys Office. However, I have notes which I have reviewed and I remember Abbe Lowell telling me that he had participated in a series of meetings with the Public Integrity Section at DOJ and that he had been informed that the case in Montgomery was not going forward. We had no further word of this case until mid to late 2005. For a variety of reasons it was my opinion that the matter was closed.

When the case came back to life around the time of Mr. Scrushy's acquittal in Birmingham (June 2005), I inquired with Assistant United States Attorney (AUSA) Louis Franklin why it had come back to life and he refused to give me any information in this regard. In fact, by the time I spoke with Franklin the case had already been indicted, was under seal and therefore was not publicly available. Contrary to this fact, I was lead to believe that the matter was just under investigation. The original indictment was subsequently superseded with a new indictment which was later unsealed. It was when this indictment (the superseding) was unsealed that I learned that Richard Scrushy had been under indictment for some time, to include throughout my preceding conversations with the government. During the course of phone conversations and one in person meeting with Franklin prior to the unsealing of the second indictment (the meeting was attended by many of the lawyers on the prosecution team, except Mr. Feaga) I repeatedly asked if the government had made a charging decision and I was always informed that they had not. In fact, as referenced above, the case was already under indictment and under seal at the time of my conversations with the government. If I had known that my

client had already been charged with a crime, I would have completely reevaluated having any communication with the government. The government sought information from Mr. Scrushy which I provided under the belief that providing the information would possibly avoid indictment. In fact, the government was lying to me, my client had already been indicted and they were ferreting out my defense in the case. We moved to dismiss the case based upon these lies and that motion was denied.

I want to say, as an employee of the United States Department of Justice for 19 years, that I am shocked and repulsed by the lies that were told to me. This action on the part of all of those involved is a stain upon the Department of Justice.

As to the information the government wanted from Richard Scrushy, AUSA Steve Feaga was always very direct as to what he wanted Mr. Scrushy to say. He wanted Richard to say that there was a quid pro quo, that is, an agreement between Richard Scrushy and Governor Siegelman to the effect that Richard would make a campaign contribution and the Governor would appoint Richard to the CON board. We repeatedly told Feaga and Franklin that there was no quid pro quo. The conversations with Feaga always ran a familiar course. We would discuss the facts as we understood them from our client and Feaga would say, "this is what I must have" and he would outline a quid pro quo which we repeatedly informed him our client could not provide because neither the campaign contribution nor the appointment to the CON board happened that way.

The discussions with AUSA Feaga (often with Franklin present) occurred long after we learned about the indictment, as we approached the trial, and were for the purpose of trying to resolve the case for Mr. Scrushy. As time passed Feaga and Franklin were amenable to getting Richard out of the case with some nominal plea in state court. The precise nature of the agreement was never finalized due to the need for DOJ approval for the overall plan to dismiss. I was told by the prosecutors in Montgomery that any agreement was dependant upon approval from the Department of Justice in Washington. It was during this time period that AUSA Feaga told me that in his opinion Richard Scrushy was a "victim" in this case. In political corruption cases prior to the passage of Title 18, United States Code, § 666, the vernacular and legal concept was that the politician extorted funds from "victims."

As part of this plan to possibly dispose of the case I was given the name of the Acting Chief of Public Integrity, Andrew Lourie. I spoke with Mr. Lourie on April 4, 2006 in order to set up a meeting at his office in Washington. During this discussion Mr. Lourie told me that he did not want to take me down a wrong path and that his position was fixed on a plea to misprison of a felony. I asked him whether that meant that he would not consider a misdemeanor and he told me that he would discuss it but he did not think he would approve it. He told me he would not agree to dismiss the case. Lourie said based upon the proffer that misprison of a felony was the best fit in terms of a plea and that Richard would just have to add a new portion to his proffer, that is, Richard would have to change his statement to the government. Lourie suggested that Richard admit that he knew that the Governor was committing a crime by demanding (that is extorting) a contribution, that Richard should have rejected the Governor's demands, but because

he did not, Richard would admit that he committed a crime. Mr. Scrushy rejected any such plea as completely inconsistent with the facts. I went forward with the meeting in Washington hoping that along with my efforts, the prosecutors in the Montgomery office would persuade Lourie that getting Richard out of the case was best for Mr. Scrushy and the government.

The meeting with Andrew Lourie took place in Washington D.C. on April 6, 2006. We met him in the Public Integrity office and the meeting went as one would expect. Under normal circumstances when the prosecutors in the field desire a particular resolution Washington approves and the agreement moves forward. We discussed the fact that the prosecutors in Montgomery had informed me that they supported getting Scrushy out of the case. By the conclusion of the meeting it appeared to me that some arrangement would be approved. As we departed Mr. Lourie told me that he would have a decision within a week.

On Friday April 14, 2006 I received a phone call from AUSA Franklin informing me that no decision would be made until the next week. He also told me that he was embarrassed to make the call. Later that afternoon, I received a phone message from Andrew Lourie in which he informed me that the offer for Mr. Scrushy was felony misprison. I returned the call but I could not get Mr. Lourie on the phone and I left a message asking that he call me.

As time passed and the trial approached I made several attempts to get Mr. Lourie on the phone and could not get Mr. Lourie to take my call or return my call. I eventually got him on the phone and he seemed unprepared for the conversation. He said Mr. Scrushy would have to plead to misprison of a felony in order to resolve the case. I asked him what happened and why Washington would not approve a resolution which had been supported by the field (the Montgomery U.S. Attorney office). Lourie informed me that the decision was made over his head. I immediately asked if that meant that it was the Assistant Attorney General (AAG Alice Fisher) for the Criminal Division. He responded to me that it was not the AAG and that the decision had been made higher than the AAG for the Criminal Division. I was completely puzzled by this response and I asked him if he meant that it was made in the Deputy Attorney General's office because I could not imagine a decision like this rising to that level of the Department of Justice. (AAG Fisher and everyone above her were political appointees.) He told me that he could not discuss the decision making process any further and that he really should not have shared what he did with me and that he would be in trouble if it were known that he had shared the little information he provided to me.

My client would not agree to plead guilty to misprison of a felony because he did not agree – and would not say – that he had done anything illegal in his dealings with Governor Siegelman.

Sincerely,

s/*Arthur W. Leach*
Arthur W. Leach
Attorney for Richard M. Scrushy

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